EDITOR'S NOTE

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(1)

. 85-5939-CSY
atus: GRANTED

Title: Eulogio Cruz, Petitioner
v.
New York

cketed:
vember 29, 1985

Court: Court of Appeals of New York

Counsel for petitioner: Weinstein, Philip L., Dean, Robert

Counsel for respondent: Merola, Mario, Coddington, Peter D.

try	Date	Note	Proceedings and Orders
1	Nov 29 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 25 1986		DISTRIBUTED. **********
4	Jan 28 1986	F	Response requested.
5	Feb 27 1986		Brief of respondent New York in opposition filed.
6	Mar 6 1986		REDISTRIBUTED. March 21, 1986
8	Mar 24 1986		REDISTRIBUTED. March 28, 1986
9	May 30 1986		REDISTRIBUTED. June 5, 1986
1	Jun 9 1986		Petition GRANTED. **********
2	Jun 25 1986		Record filed.
3	Jul 25 1986		Certified original record, 3 volumes, received.
4	Jul 25 1986		Joint appendix filed.
5	Jul 24 1986		Brief of petitioner Eulogio Cruz filed.
7	Aug 15 1986		Order extending time to file brief of respondent on the merits until September 2, 1986.
8	Aug 30 1986		Brief of respondent New York filed.
9	Sep 2 1986		Brief amicus curiae of United States filed.
0	Sep 9 1986	G	Motion of the Solicitor General for leave to participate oral argument as amicus curiae and for divided argument filed.
1	Sep 22 1986		CIRCULATED.
2	Oct 6 1986		SET FOR ARGUMENT. Monday, December 1, 1986. (3rd case) (1 hour).
3	Oct 14 1986		Motion of the Solicitor General for leave to participate oral argument as amicus curiae and for divided argument GRANTED.
4	Oct 28 1986	X	Reply brief of petitioner Eulogio Cruz filed.
5	Dec 1 1986		ARGUED.

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

1986 TERM

No. 85-5939

EULOGIO CRUZ,

Petitioner,

-against-

NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

PHILIP L. WEINSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420
Counsel for Petitioner

ROBERT S. DEAN
Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES
1986 TERM

No.

EULOGIO CRUZ,

Petitioner,

-against-

NEW YORK,

Respondent.

The petitioner Eulogio Cruz respectfully prays that a writ of certiorari issue to review the order and opinion of the New York State Court of Appeals entered on October 17, 1985.

OPINIONS BELOW

The opinion of the New York Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Supreme Court of the State of New York, Appellate Division, First Department. The opinion of the Supreme Court of the State of New York, Bronx County (Eggert, J.), reported at 119 Misc. 2d 1080, 465 N.Y.S.2d 419 (1983), appears in the Appendix hereto.

JURISDICTION

The order of the New York Court of Appeals was entered on October 17, 1985, and this petition for certiorari was filed within 60 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the introduction at a defendant's trial of his nontestifying co-defendant's videotaped confession, which factually interlocks with the defendant's own alleged oral confession to a citizen informant, but which was far more reliable, violates the Confrontation Clause.

2. Whether two confessions with so greatly different levels of certainty that they were actually uttered can be considered "interlocking."

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments VI and XIV.

STATEMENT OF THE CASE

Petitioner Eulogio Cruz was indicted with his brother, Benjamin, in New York Supreme Court, Bronx County, for felony murder (N.Y. Penal Law §125.25[3])[1] and related offenses in connection with the killing of a

---

1 New York Penal Law §125.25 (subd. 3) states in pertinent part:

A person is guilty of murder in the second degree when:

* * *

> 3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. . . . [Emphasis supplied].

gas station attendant during a robbery on November 29, 1981.

There were no eyewitnesses to the robbery. The only direct incriminating evidence against either defendant at their joint trial were petitioner's and Benjamin's alleged oral confessions to one Norberto Cruz (no relation to petitioner) the morning after the robbery, and Benjamin's videotaped confession to the prosecutor five months later.

According to the evidence presented by the People at trial, about five months after the robbery of the gas station, one Jerry Cruz, Norberto Cruz's brother, was killed. The police interviewed Norberto several times during their investigation of that homicide. Norberto testified that only after petitioner "tried to take me to the place where they had killed my brother" (156),[2] did he tell the police that on November 29, 1981, five months earlier, petitioner and Benjamin came to his apartment and said that they had just robbed a gas station and killed the attendant. According to Norberto's trial testimony, petitioner's confession to him consisted entirely of the following:

> "Q. What did [petitioner] tell you?
>
> "A. That they had gone to give a hold up to a gas station and that he started struggling with him.

[2] Unprefixed numbers refer to the minutes of the trial, dated September 27-October 5, 1983. Numbers preceded by "A" refer to the pages of the Appendix attached hereto.

> THE COURT: Excuse me, speak up. Raise your voice.
>
> "A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station" (126).

Shortly after Norberto's statement to the police, Benjamin Cruz went to the police station and made a confession, recorded on videotape, to an assistant district attorney. In this 22-minute confession, Benjamin gave a finely detailed account of how he, Jerry Cruz, and petitioner had held up a gas station and killed the attendant. When petitioner was subsequently arrested, he made no statement to the authorities.

Petitioner had moved pretrial for a severance on Bruton grounds. The court reserved decision and ordered the trial to proceed (A. 29-34).[3] At a first trial before Justice Eggert, the People introduced the videotaped confession and Norberto Cruz testified to the defendants' admissions to him the day of the slaying. Neither defendant testified. Petitioner renewed his Bruton argument, but the court denied a severance (A. 35-39).

In its written decision (A. 22-28), the court found that petitioner's confession to Norberto Cruz and Benjamin's videotaped confession "interlocked" in terms of factual content. The court acknowledged that there was a "radical" difference in the level of reliability

[3] The pages of transcript in which petitioner raised the Bruton issue in the trial court are included in the Appendix hereto (A. 29-40).

that each confession was actually uttered (A. 24). It held, however, that for two confessions to come within the "interlocking confession" exception to the Bruton rule, there was no requirement in New York case law or this Court's decision in Parker v. Randolph, 442 U.S. 62 (1979), that "they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making, and the reliability of the evidence that the confessions were actually made" (A. 25-26).

The first trial ended in a mistrial because of juror misconduct. Prior to the second trial, counsel again moved for a severance. The court denied the motion based upon Justice Eggert's previous decision (order of Cerbone, J., dated September 26, 1983).

At the second joint trial, which resulted in the judgment appealed herein, Norberto Cruz testified as to the defendants' alleged confessions to him. Counsel for petitioner challenged the reliability of the alleged confession by eliciting, inter alia, Norberto's prior record, unsavory lifestyle, and his delay in coming forward with his information until after his brother was murdered (132-143, 156-159). Over petitioner's objection (A. 40), Benjamin's videotaped confession was played to the jury. Additionally, the People presented police testimony, forensic evidence and photographs which established the robbery and the killing, but not the identity of the culprits. Neither defendant testified, and the court gave

limiting instructions that each defendant's confession was admissible only against the defendant who made it.

The jury found the defendants guilty of the only count submitted to it, felony murder. The court sentenced petitioner to an indeterminate life sentence with a minimum of 15 years.

On appeal to the intermediate appellate court, the Appellate Division, First Department of the Supreme Court of the State of New York, petitioner argued, inter alia, that the failure to sever deprived him of his Sixth and Fourteenth Amendment right to confrontation. The Appellate Division affirmed the conviction without opinion on October 25, 1984. 104 A.D.2d 1060 (1984).

On October 17, 1985, the Court of Appeals, by a four to two vote, affirmed the Appellate Division's order. In its majority opinion, the Court agreed with the trial court's ruling that the disparity in reliability between the defendants' confessions was irrelevant in deciding the Bruton question: So long as the confessions interlocked as to factual content, the "interlocking confession" exception to the Bruton rule applied (A. 10-15). In dissent, two judges rejected:

> the per se rule now established by this case that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw

> evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed. The rationale of Bruton is otherwise rendered meaningless (A. 21) .

REASONS FOR GRANTING THE WRIT

> 1. Supreme Court review of this case will resolve the issue left open by Parker v. Randolph [422 U.S. 62 (1979)]: i.e., whether the Confrontation Clause of the Sixth Amendment is violated by the introduction against a defendant of his non-testifying co-defendant's confession, which interlocks with his own confession but which is far more inculpatory.

In Parker v. Randolph, 442 U.S. 62 (1979), the eight members of this Court sitting were evenly divided on the issue of whether "interlocking" confessions of criminal co-defendants were per se admissible as an exception to the holding of Bruton v. United States, 391 U.S. 123 (1968), that the admission of a non-testifying co-defendant's confession violated the Confrontation Clause of the Sixth Amendment. Four members of the Court joined a plurality opinion holding "interlocking" confessions always admissible, while four other members, including Justice Blackmun concurring in the judgment, adhered to the Bruton rule subject only to harmless error analysis. 442 U.S. at 77-91. This case again clearly presents the question of whether the admission of an "interlocking" confession can ever violate the Confrontation Clause. Here, the co-defendant's videotaped confession, held to

be factually interlocking with petitioner's alleged oral one by the New York Court of Appeals, was nonetheless uniquely damaging to petitioner's case, and under the Bruton rule its admission would have been reversible error. Accordingly, the Court should grant certiorari to resolve the question left open by the divided opinion in Parker v. Randolph.

The rationale for the opinion of the plurality in Parker was that when the defendants have made substantially the same confession, little prejudice can result from the inability of one defendant to cross-examine the other. Parker v. Randolph, 442 U.S. at 72-76 (plurality opinion). This reasoning is not adequate, since a determination that statements "interlock" does not in itself answer the crucial question of whether the admission of a co-defendant's confession, without cross-examination, is so prejudicial that it should not have been allowed, even with limiting instructions. More of an inquiry is needed. As Justice Blackmun succinctly stated in his concurrence in Parker,

> The fact that confessions may interlock to some degree does not ensure, as a per se matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such cir-

> cumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.

422 U.S. at 79.

Although this Court granted certiorari in Parker to resolve a conflict in the circuits over whether Bruton applies at all to "interlocking confession" situations, 442 U.S. at 68 n.4, the conflict continues. Of the Circuits that have considered the issue post-Parker, at least three have adopted the harmless error standard set forth in Justice Blackmun's concurrence. United States v. Ruff, 717 F.2d 855 (3rd Cir. 1983); United States v. Espericueta-Reyes, 631 F.2d 616, 624 n.11 (9th Cir. 1980); United States v. Parker, 622 F.2d 298, 301 (8th Cir. 1980). The Seventh Circuit is openly undecided which approach to take. Montes v. Jenkins, 626 F.2d 584, 587 (7th Cir. 1980). At least three circuits have adopted the plurality reasoning. United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984); Tamilio v. Fogg, 713 F.2d 18 (2nd Cir. 1983), cert. denied, 104 S. Ct. 706 (1984); Poole v. Perini, 659 F.2d 730, 733 (6th Cir. 1981). For this reason, the Parker decision has been labeled "inconclusive" in resolving the analytical conflict. Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich L. Rev. 1379, 1421 (1979).

Petitioner's case is a prime vehicle for this Court to resolve the conflict. Assuming, as the New York Court of Appeals held, that petitioner's alleged confession to Norberto and Benjamin's videotaped confession interlock because they both constitute full confessions to the same crime, then, under the standard set forth by the Parker plurality opinion, no Bruton violation occurred. However, under the standard set forth in Justice Blackmun's concurrence, a Bruton violation did occur. Furthermore, the error could not be harmless since, in light of the gross disparity between the reliability of the evidence that the confessions were actually uttered, the jury would naturally have looked to Benjamin's confession to resolve its doubts about petitioner's.

As the Court of Appeals dissent noted, the disparity in the levels of reliability that each defendant's confession was made was "enormous" (A. 21). Benjamin's confession was memorialized on videotape by the prosecutor. It would be hard to imagine a recording method that would inspire greater confidence that the confession had actually been uttered. The "recorder" of petitioner's statement, Norberto, inspired much less confidence.[4] As

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[4] It should be noted that, while the facts contained in both confessions were more or less consistent with the physical evidence found at the homicide scene, only Benjamin's videotaped confession contained detail so realistic and minute that only someone who was present at the homicide scene could have uttered it. The minimal detail contained in petitioner's alleged confession to Norberto, on the other hand, could have come solely from second-hand knowledge of the crime that Norberto acquired from someone other than petitioner -- for example, Norberto's brother Jerry, a member of the robbery team.

the dissent also noted (A. 20), Norberto had a prior record; received welfare payments even as he plied his trade "on the street" as a mechanic; took household expense money from his brother Jerry, a professional felon, without (he claimed) asking him about the source of the money; and had earlier testified that it was Benjamin, and not petitioner, who had made the confession to him. Most significant, Norberto reported nothing of petitioner's alleged statement until his brother Jerry had been murdered and petitioner, as Norberto stated, "tried to take me to the place where they had killed my brother" (A. 20).

The dissent also pointed out that the videotaped confession filled in a logical gap in the People's case against appellant (A. 20). Only in Benjamin's videotaped confession is there clear and unequivocal evidence that Jerry Cruz, Norberto's brother, had taken part in the robbery/homicide. Thus, only the videotape explained to the jury why Norberto did not come forward with his information for five months (to protect his brother), and why the defendants went to Norberto's apartment after the crime (to pick up Jerry, not confess during a casual social call). Even the Court of Appeals majority conceded that the joint nature of the trial therefore "harmed [petitioner's] case tactically" by denying him "a more favorable atmosphere in which to attack his confession" (A. 16).

Other than the defendants' confessions, there was no direct evidence linking petitioner to the crime, as the dissent noted (A. 19).

In sum, despite the factually interlocking nature of the two confessions, as the dissent correctly concluded (A. 19):

> By no stretch of the imagination can it be said that the 22-minute videotaped confession . . . added no substantial weight to the government's case against defendant or did not fill in material gaps in the necessary proof against him.

Mere examination, therefore, of whether statements interlock to some degree cannot invariably answer the question whether there has been a violation of the Confrontation Clause, as the Parker plurality suggested. Rather, as the four other justices in Parker recognized, if a defendant has been unfairly prejudiced, "the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects." 442 U.S. at 79. The correct formulation was the one chosen by the concurrence in Parker, to determine whether the admission of the co-defendant's confession was harmless beyond a reasonable doubt pursuant to Harrington v. California, 395 U.S. 250 (1969). Since petitioner's conviction must be reversed under this formulation, this case merits a grant of certiorari to review the judgment below.

> 2. Supreme Court review of this case would clarify the issue left unresolved by the plurality opinion in Parker v. Randolph [422 U.S. 62 (1979)] of to what extent a co-defendant's confession must "interlock" with the defendant's own before its admission does not violate the Bruton rule.

The rationale for exempting from the Bruton rule cases where the accused has himself confessed was succinctly stated by the Parker Court:

> The defendant is "the most knowledgeable and unimpeachable source of information about his past conduct" (citation omitted), and one can scarcely imagine evidence more damaging to his defense than his own admission of guilt. Thus, the incriminating statements of a codefendant will seldom, if ever, be of the "devastating" character referred to in Bruton when the incriminated defendant has admitted his own guilt.

Parker, 442 U.S. at 72-73. The Parker plurality made no attempt to delineate when co-defendants' statements would interlock sufficiently to come within the exception. 442 U.S. at 79-80 (Blackmum, J., concurring).

In holding that there was no Bruton error in petitioner's case, both the trial court and the New York Court of Appeals held that a great disparity in the reliability of two confessions was irrelevant so long as they interlocked as to the essential facts of the crime. That interpretation of the plurality opinion in Parker exalts form over substance. So long as the co-defendant's confession is far more damaging to the defendant's defense

than his own, it should not matter that the damage is caused by a gross disparity in reliability rather than factual content.[5]

Given Norberto Cruz's tenuous reliability as a witness, the jury, looking solely at his testimony, could easily have doubted Norberto's claim that petitioner had confessed to him. Any such doubts, however, were easily resolved by reference to the videotaped confession. Because Norberto's testimony was the sole link between petitioner and the homicide, the jury's learning of Benjamin's video confession must have contributed to the verdict.

The correctness of the New York courts' determination that confessions can "interlock" notwithstanding vast differences in their levels of reliability is therefore open to serious question. A grant of certiorari would provide this Court with the opportunity to determine the extent to which statements must interlock before a co-defendant's confession is admissible under that exception to the Bruton rule.

---

5 Moreover, part of the Parker plurality's rationale was that the defendant's own "unchallenged" confession would be no more devastating to his case than a co-defendant's confession. 442 U.S. at 73. Petitioner, however, mounted a substantial challenge to the reliability of his alleged confession by eliciting evidence that Norberto was an unreliable witness with a motive to frame the defendants.

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE ORDER AND OPINION OF THE NEW YORK STATE COURT OF APPEALS.

Respectfully submitted,

PHILIP L. WEINSTEIN
Counsel for Petitioner

ROBERT S. DEAN
Of Counsel
November 21, 1985

APPENDIX

State of New York
Court of Appeals

1 No. 413
The People &c.,
Respondent,
v.
Eulogio Cruz,
Appellant.

2 No. 414
The People &c.,
Respondent,
v.
Belton Brims,
Appellant.

(413) Robert S. Dean & William E. Hellerstein, NY Legal Aid, for appellant.
Mario Merola,DA, Bronx County(Mark L. Freyberg & Peter D. Coddington of counsel) for respondent.

(414)Bennett L. Gershman,White Plains, for appellant.
Kenneth Gribetz,DA,Rockland County(John S. Edwards of counsel) for respondent.

* * * * * * * * * * * * * * * * *

Case #413 - People v Cruz (Eulogio)

Order affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Jasen and Titone concur. Judge Kaye dissents and votes to reverse in an opinion in which Judge Meyer concurs. Judge Alexander took no part.

Case #414 - People v. Brims (Belton)

Order affirmed. Opinion by Judge Simons. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Titone concur. Judge Alexander took no part.

Decided October 17, 1985

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

SIMONS, J.

Defendant Eulogio Cruz has been convicted of murder second degree committed during the course of a gas station robbery in the Bronx. Defendant Belton Brims has been convicted of two counts of murder second degree and other crimes committed during the burglary of a private home in Spring Valley, New York. Both defendants were tried jointly with co-defendants and the principle issues submitted in these appeals are whether the courts' refusal to grant defendants' motions for severance resulted in trials impermissibly flawed contrary to the rule of

Bruton v United States (391 US 123; see, also, Roberts v Russell, 392 US 293), and if not whether reversal is nevertheless required because the prosecutions failed to meet minimum standards of fairness (see, People v Payne, 35 NY2d 22; People v La Belle, 18 NY2d 405). In each trial statements of the co-defendants and the defendants were received in evidence. The basis for defendants' claims are their assertions not only that the content of their non-testifying co-defendant's statements did not "interlock" with their own but that even if the statements were substantially the same, defendants were prejudiced because the reliability of the co-defendants' confessions, made in the controlled environment of a police station, to police officers and under circumstances rendering them more credible, was greater than that of defendants' alleged confessions, made to lay witnesses having motives to falsify. Because of this difference in reliability, defendants contend that the jurors must have used the co-defendants' statements to resolve any doubts about defendants' guilt, even though they were instructed not to do so. Defendant Brims urges other grounds for reversal but those claims are either unpreserved or harmless (see, People v Crimmins, 36 NY2d 230). Neither defendant challenges the sufficiency of the evidence and, in the absence of legal error, the convictions should be upheld.

There should be an affirmance. The introduction of a co-defendant's testimony may, in some instances, substantially impair the defendant's right to confrontation or to a fair trial. The confessions of the defendant and co-defendant in each of these cases interlocked, however, and even though they differed in length and in the circumstances under which they were made, the co-defendant's statements could properly be received with

appropriate limiting instructions, regardless of differences in their comparative reliability (People v McNeil, 24 NY2d 550, cert denied sub nom Spain v New York, 396 US 937; Parker v Randolph, 442 US 62). Because defendants' statements not only interlocked with those of their co-defendants, but also contained legally corroborated admissions of all the elements of the crime of which they were convicted, defendants were not denied a fair trial and the motions for severance were properly denied.

PEOPLE v CRUZ

Defendant Cruz was indicted with his brother, Benjamin, for the felony murder of a gas station attendant committed November 29, 1981. Jerry Cruz, who was not related to defendant, was also a participant in the robbery. Some five months later Jerry Cruz was killed and during the course of the investigation of the homicide, the police interviewed his brother, Norberto. Norberto told the police that defendant and Benjamin came to his apartment the morning after the gas station robbery and that at the time defendant was nervous and wearing a blood-stained bandage around his right forearm. Norberto said that defendant told him that he and Benjamin had gone to a gas station in the Bronx the night before intending to rob it and that during Eulogio's struggle with the attendant the attendant had bent down behind the counter, procured a gun and shot him in the arm. Defendant said that Benjamin then jumped up and shot the attendant. Norberto said Benjamin told him a similar account of the incident, although he did not explain to Norberto how defendant was injured or that the brothers had gone to the station that night intending to rob it. Norberto said that he

had offered to take defendant to the hospital for treatment of his wounds but defendant refused to go because to do so was "very dangerous". At the trial, Norberto testified that he had been a friend of Eulogio's for 25 years, since they had grown up together in Puerto Rico. He remembered the date Eulogio and Benjamin came to his apartment because his wife was discharged from the hospital that day. When asked on cross-examination why he had not gone to the police earlier with this information, Norberto said that he could not because his brother Jerry "had the event".

Shortly after Norberto's statements to the police, Benjamin Cruz learned that they were looking for him and went to the police station. While he was being questioned about the death of Jerry Cruz, he blurted out that he and defendant had killed the gas station attendant in the Bronx. Subsequently he gave a complete confession to the police which was recorded on video tape. Defendant and his brother were indicted together for felony murder.

Before the trial defendant moved for a severance, but the motion was denied (see, 119 Misc 2d 1080). Both Norberto's testimony implicating the brothers and the video tape of Benjamin's confession were received in evidence during the trial with appropriate limiting instructions. The first trial was aborted because of juror misconduct but the confessions were again received at a second trial which resulted in the judgment now before us convicting defendant. In addition, the People presented police testimony, forensic evidence and photographs which established the robbery and the killing, the location of the victim's body, the injuries to his face and the substantial

damage to the office, inferentially establishing defendant's struggle with the attendant before the murder. Also introduced was medical evidence of the trajectory of the bullets as they entered the victim's head from above, corroborating the evidence that Benjamin was above the attendant when he shot him. Defendant offered no evidence and both defendants were convicted of felony murder.

BELTON BRIMS

Defendant Belton Brims was convicted of two counts of intentional murder, two counts of felony murder, two counts of robbery first degree and two counts of burglary first degree. The charges arose out of an incident occurring December 28, 1980 when defendant and James Sheffield, with the assistance of Sheryl Sohn and Willie Brims, burglarized Sheryl's home and killed her parents. On January 1, 1981 defendant was arrested in New York on three other felony charges. He was a prime suspect in the Sohn murders at the time but, after he waived extradition, he was returned to New Jersey to answer felony charges against him there. Brims was subsequently convicted in New Jersey of armed robbery and sentenced to a term of imprisonment of twenty-five years to life. In the meantime, defendant, Sheryl Sohn and James Sheffield were indicted in New York for multiple charges arising out of the Sohn homicides. Defendant was returned to New York and the three defendants were tried together.

None of the defendants testified, but Sheryl Sohn's confession to the police, in which she told the police that she had helped Brims and Sheffield enter her parents' home the evening of the crime, was received in evidence against her. She said she had met the two men at a bar and told them she would

unlock the door for them; they could await her parents' return from a party and then, when they returned, rob them. She also agreed that they could have all the valuables they found, except for a diamond ring which her mother would be wearing that she wished for herself. Sheryl said that defendant and others left for the house while she remained at the bar with a friend, but they returned shortly thereafter and told her they were unable to get in. She went home, checked the door again to insure that it was unlocked, and then returned and told defendant and Sheffield. Apparently they were still unable to enter the house and returned to the bar a third time. At that time Sheryl explained the floor plan of the house to the defendants and they left. Her oral statements were later reduced to writing and admitted at the trial. Her statement was redacted to eliminate references to other crimes but the names were left in it.

The People introduced two prior statements by defendant. One was made to his cousin, Willie Brims, who had gone to the Sohn house with defendant and Sheffield but remained in the car while they were inside. Willie Brims was not charged with any crime despite his participation that night. He testified about the several trips from the bar to the house and return while defendant and Sheffield tried to gain entry, about leaving the house after the crime, and about the place where the participants had disposed of various pieces of evidence that night. Willie testified that when defendant returned to the car after leaving the Sohn's house on the night of the crime, he told him that he had "done some serious business" inside. Defendant explained that statement to him a few days later. He said that when the Sohns had returned to the house that night Sheffield

"had beat [Mr. Sohn's] brains out with the butt of a gun" and that he had "drowned the bitch". Defendant said he had made Mrs. Sohn drink gin before drowning her and that she had fainted when she saw her husband assaulted. He then dumped her into the bath tub he had filled with water, face down. During this conversation with Willie, defendant showed him a photo of Jackie Shoulders and said she was his girlfriend. Defendant told Willie to "be cool" and in thirty to ninety days they would be paid [for the jewelry].

The People introduced another statement of defendant made to John Riegel, a New Jersey prisoner occupying a cell near defendant during his incarceration there in January, 1981. Riegel had been a former assistant bank vice-president and private entrepreneur who, after a series of financial setbacks, had turned to crime. Between 1977 and 1981 he had been the subject of several charges involving forgery, issuing bad checks and the use of stolen credit cards.

Riegel testified that, during the nine days they were together in jail, defendant told him that he had planned the Spring Valley robbery with the slain couple's daughter, that he and his partner had waited in the house until the victims had returned home and that he had drowned the woman. Defendant said he had told his partner to kill the husband by hitting him over the head. Riegel said that defendant claimed he had received about twenty to twenty-two thousand dollars in the robbery and that all the daughter wanted for her help was a diamond ring. Defendant also told him that he had given part of the jewelry to a young girl from Virginia (Jackie Shoulders). Defendant was worried because her name was on a slip of paper in his pants

pocket and, if the police found the slip and located her, they would discover that she had received from him a valuable piece of jewelry missing after the robbery.

There was substantial evidence to corroborate these confessions, indeed the evidence of defendant's guilt was overwhelming. Some of the more significant items included evidence of blood discovered in Willie's car in places consistent with his testimony about his passengers and where they entered and exited the car after the killings, and the ski mask and gun used the evening of the crime, found discarded as he had described. Forensic evidence was introduced which established that the gun was broken and that the pattern injuries on Mr. Sohn's skull exactly matched its shape. Forensic evidence also established that blood found on defendant's sneakers after the crime was the same, a very rare blood type possessed by Mr. Sohn. Defendant attempted to establish an alibi, that he was in New York City acquiring drugs for Sheryl at the time of the killing, but even his witnesses failed to support his alibi.

The Legislature has provided that the prosecution of two or more parties charged with the same offense or offenses may be joined for trial (CPL 200.40). Recognizing that joinder results in prejudice, however, it granted the court the power to order separate trials when the public policy considerations of trial convenience, economy of judicial and prosecutorial resources and speed which underlie the statute are outweighed by unfairness to the accused. An application for severance is addressed to the Trial Judge's discretion. He must decide whether possible unfairness will result, whether it can be minimized by measures short of separate trials or whether

severance is required. Normally, the trial court's ruling on the motion will not be disturbed but his discretion is not absolute, nor is his determination final, for "[a] retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning" (People v Fisher, 249 NY 419, 427). Accordingly, we may properly review the courts' severance rulings in these two appeals.

When two defendants are tried together, the extra-judicial statement of one is hearsay as to the other and, if the statement is admissible at all, it may be admitted only when the jury is properly instructed that it may not consider one defendant's statement as evidence in assessing the guilt of the other. In Bruton the Supreme Court held that because of the substantial risk that a jury, despite such instructions to the contrary, will look to the incriminating extra-judicial statements of a non-testifying co-defendant, admitting such a confession violates defendant's right of confrontation (Bruton v United States, 391 US 123, supra; see, also, People v Safian, 46 NY2d 181, 187, cert denied 443 US 912). A recognized exception to the Bruton rule holds that if the statements of the defendant and co-defendant are substantially identical, or "interlock", there is no violation of defendant's right to confrontation. The rationale is that if the statements interlock, the co-defendant's statement is no more inculpating than is defendant's statement. It can hardly have the "devastating effect" on defendant's case referred to in Bruton if defendant similarly has admitted his complicity in the crime (see, People v McNeil, 24 NY2d 550, 553, supra). Key also is recognition that the right to confrontation is not absolute (Dutton v Evans, 400 US 74, 89;

People v Sugden, 35 NY2d 453, 460). The confrontation clause is intended to insure fairness and accuracy by giving a defendant an opportunity to challenge evidence against him, particularly a co-defendant's statement, even though the jury may not consider it, because of the natural tendency of a co-defendant to shed blame and implicate his accomplice. The danger that the jury will consider unreliable hearsay is minimized, however, when the defendant has confessed. For these reasons, the interlocking confession exception to the Bruton rule was recognized early by this Court (People v McNeil, supra; People v Galloway, 24 NY2d 935) and by lower federal courts (see, e.g., United States ex rel. Catanzaro v Mancusi, 404 F2d 296, cert denied 397 US 942 [CCA 2]; Mack v Maggio, 538 F2d 1129 [CCA 5]; United States v Walton, 538 F2d 1348 [CCA 8], cert denied 429 US 1025; United States v Spinks, 470 F2d 64 [CCA 7], cert denied 409 US 1011; Metropolis v Turner, 437 F2d 207 [CCA 10]; but cf. United States v DiGilio, 538 F2d 972 [CCA 3], cert denied sub nom Lupo v United States, 429 US 1038) and the Supreme Court of the United States has similarly recognized it (Parker v Randolph, 442 US 62). Indeed, one observer has interpreted the plurality opinion in Parker as holding that, as long as the defendant has confessed, "interlocking" is not required (see, Dawson, Joint Trials of Defendant in Criminal Cases; An Analysis of Efficiencies and Prejudices, 77 Mich L. Rev. 1379, 1421; but see, Parker v Randolph, 422 US 62, supra, at 75).

Confessions are "interlocking" if their content is substantially similar (People v Smalls, 55 NY2d 407, 415; People v Safian, 46 NY2d 181, supra, at 184; Forehand v Fogg, 500 F Supp 851, 853; compare People v McNeil, supra, at 552 ["almost

identical"]). The statements need not be identical, it is sufficient that both cover all major elements of the crime involved (see, People v Woodward, 50 NY2d 922; People v Berzups, 49 NY2d 417, 425; Tamilio v Fogg, 713 F2d 18, 20) and are "essentially the same" as to motive, plot and execution of the crimes (United States ex rel. Ortiz v Fritz, 476 F2d 37, 39; Forehand v Fogg, supra; cf. United States v Kroesser, 731 F2d 1509). Statements are substantially similar when defendant's confession is close enough to the co-defendant's with respect to the material facts of the crime charged to make the probability of prejudice so negligible that the end result would be the same without the co-defendant's statement (People v Berzups, supra, at 425; People v Safian, supra, at 188; see, also, People v Fisher, 249 NY 419, 426). Confessions do not "interlock" if a co-defendant's confession may be used to fill material gaps in the necessary proof against defendant (see, People v Smalls, supra; People v Burns, 84 AD2d 845).

The two sets of confessions before us interlock. There are differences, of course. There always will be, given human nature, the variations in human recall and the manner in which witnesses testify. Indeed, as a practical matter the evidence of witnesses is usually more suspect if they harmonize too closely. But the Cruz brothers agreed, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed. Although Benjamin's statement was substantially longer, the details included did not contradict or modify the essential elements of defendant's statement. The content of the confessions in Brims was markedly

different, more because Sheryl Sohn had not entered the house and did not know or apparently contemplate that homicides would occur. But to the extent of her knowledge of the crime, her statement fully interlocked with defendant's two confessions. Thus, she described the agreement with defendant and Sheffield, the several trips to the house to provide entry and the arrangement for disposition of the jewelry. Sheryl's confession, admissible only as to her, could hardly have prejudiced defendant whose recitation in his confession of the same events she described was substantially similar. Indeed, it is difficult to perceive how Sheryl's confession, which described only the preliminary arrangements with defendant, could have a "devastating" effect on defendant in view of his two confessions reciting the gory events that took place once he and Sheffield entered the Sohn home and murdered Sheryl's parents (cf. People v Smalls, supra).[1]

Defendants' major complaint is not that the content of the confessions was dissimilar but that they differed in reliability: in the Cruz case Benjamin's 22 minute video-taped confession to the police was contrasted with defendant's oral confession to a friend with a possible motive to falsify[2] that was not revealed to the police for five months; in Brims a written confession to police officers was compared to oral

1. On a related point made by defendant Brims, there was no error in receiving his two confessions although they differed in minor detail. Neither was hearsay as to him.

2. Defendant speculates that Norberto may have sought revenge against him for the death of Jerry Cruz. There is nothing in the record to support that claim.

confessions to, first, an accomplice who was extended leniency by the prosecutor and, second, a fellow prisoner awaiting disposition of the charges against him.

The contention that the exception to the Bruton rule for interlocking confessions does not apply when the confessions differ as to reliability has been rejected by this Court (see, People v Woodward, 50 NY2d 922, affg 66 AD2d 866 [see, dissenting opn of Shapiro, J. for facts at p 866]) and other courts (see, People v Santanella, 63 AD2d 744, lv to app denied sub nom People v Tamilio, 45 NY2d 784, cert denied sub nom Tamilio v New York, 443 US 912; Tamilio v Fogg, 713 F2d 18, revg 546 F Supp 364). Indeed, when the rule was announced it was both anticipated that there would be differences in the scope and reliability of the confessions, and accepted that such differences would be tolerated (see, dissenting opns in People v McNeil, 24 NY2d 550, supra, and Parker v Randolph, 442 US 62, supra). Thus, decisions following the McNeil case have held that the use of the confessions is not foreclosed because one confession is oral and the other is written (People v Woodward, supra; Parker v Randolph, supra) because one is made to police officers and the other to lay witnesses (Tamilio v Fogg, supra), or because one is long and the other is short (see, People v Woodward, supra; People v Safian, 46 NY2d 181, supra). Nor is the rule any different because defendant repudiates his confession or challenges its voluntariness. None of the confessions in these two prosecutions was unreliable as a matter of law and once admissibility was determined by the court, credibility was a question for the jury (People v Woodward, supra; People v Anthony, 24 NY2d 696, cert denied 396 US 991; United States ex rel. Dukes v Wallack, 414 F2d

246, 247; United States ex rel. Catanzaro v Mancusi, 404 F2d 296, supra).

Defendant Cruz argues that, quite independent of any error in ruling on his constitutional right of confrontation, he is entitled to reversal because the trial violated fair-trial standards applicable to trials in New York involving multiple defendants and the violation resulted in "injustice or the impairment of substantial rights" (see, People v Payne, 35 NY2d 22, 26-27, supra; People v La Belle, 18 NY2d 405, 409, supra; People v Fisher, 249 NY 419, 427, supra; People v Evans, 99 AD2d 452). Defendant's right under that standard is broader than his right to confrontation. It may be violated even where the co-defendant has remained silent both before and during the trial or conversely has chosen to testify. A defendant's right to a fair trial is not impaired, however, when there is substantial evidence of guilt independent of the co-defendant's statement (see, People v Fisher, supra, p 426), or when the defendant has himself made inculpatory admissions substantially identical to those offered against him, and that admission, properly corroborated, establishes the crime (see, People v Snyder, 246 NY 491), i.e., when the error is harmless or when there is no substantial risk of prejudice. Defendant's fair trial rights are violated, however, when he is prevented, because of the complexities of a joint trial, from presenting exculpatory evidence (see, People v La Belle, supra), or when, although defendant's right to confrontation has not been impaired, his co-defendant's confession includes material evidence of crime which results in substantial prejudice to defendant by filling gaps in the evidence against him. Thus, in Payne a severance was ordered because defendant's

confession implicated him in lesser criminal activity, but did not resolve the question of whether he was guilty of felony murder. The court found a substantial risk that the missing evidence could be filled, and apparently was, by reference to the co-defendant's confession (People v Payne, supra).

The statement of defendant contained all the necessary elements to incriminate him in the felony murder. It interlocked with Benjamin's statement and it was corroborated by independent evidence sufficient to warrant the jury in accepting it as true, and sufficient to support a guilty verdict. That being so, the trial court could properly deny severance finding, in the sound exercise of its discretion, that there was no substantial risk that the jury would borrow information from Benjamin's hearsay statement to fill gaps in the evidence against defendant. If defendant was prejudiced by the joint trial, the prejudice resulted not from the fact that Benjamin's statement added substantial weight to the proof of defendant's guilt but from the fact that the denial of a severance prevented defendant from obtaining a more favorable atmosphere in which to attack his confession. That may have harmed his case tactically, but it did not deny his fundamental right to a fair trial (see, United States v Losada, 674 F2d 167, 171; United States v Werner, 620 F2d 922, 928).

Somewhat similar to defendant Cruz's fair trial claim is defendant Brims' claim that he was prejudiced because he was prevented from calling Sheryl Sohn as a witness. There was nothing before the court, however, to indicate that Sheryl would testify for defendant or that her testimony would tend to

exculpate him if she did (see, People v Owens, 22 NY2d 93, 97-98; People v Kampshoff, 53 AD2d 325, 338, cert denied 439 US 911).

Finally, defendant Brims contends that the defendants' defenses were antagonistic. A claim of antagonism may arise from a variety of circumstances, not easily cataloged, but it is clear that severance is not required solely because of hostility between the defendants, differences in their trial strategies or inconsistencies in their defenses. It must appear that a joint trial necessarily will, or did, result in unfair prejudice to the moving party and substantially impair his defense (People v La Belle, 18 NY2d 405, supra; People v Papa, 47 AD2d 902; see, generally, Anno Antagonistic Defenses as Ground for Separate Trials of Co-defendants in Criminal Case, 82 ALR3rd 245; Dawson, Joint Trials of Criminal Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich L Rev 1379, 1422-1425). Indeed, some courts have looked to see if the defenses are directly and mutually antagonistic before granting a severance, believing that the accuseds are not entitled to separate trials if one defendant seeks to exculpate himself by inculpating the other (see, Rhone v United States, 365 F 2d 980; People v Braune, 363 Ill 551, 2 NE2d 839).

It was Brims' contention at trial that he was innocent of the crime, that he had seen Sheryl Sohn that evening, but that he had been in New York City obtaining drugs and returned only after the murders had been completed. He claimed that he obtained the Sohn jewelry from a friend of Sheryl's in exchange for supplying her with drugs. Sheryl Sohn's principal defense was to contest the voluntariness of her confession for, without it, there was no case against her. Failing this, she sought to

establish that she did not actively participate in the robbery-murder and that she did not know the perpetrators would be armed. There were a few questions designed to establish that she acted out of fear of Brims because of money she owed him for prior drug transactions, but the evidence of duress was so slight that counsel neither argued the point in the summation nor requested a charge on it. Despite defendant's general claims that Sheryl Sohn's presence in the trial impeded his defense or reflected unfairly on him by causing the jury to unjustifiably infer he was guilty, there is nothing before us to establish that he was prevented from presenting exculpatory evidence by the court's desire to protect his co-defendant's rights. His present claim that he was prevented from establishing that he received the jewelry from Sheryl as payment for her prior drug purchases is contrary to his testimony at trial.

Accordingly, in each case, the order of the Appellate Division should be affirmed.

People v Cruz
No. 413
JSK (dissenting)

With respect to People v Cruz, today's decision falls far short of the standards recognized by the majority. The concern expressed in Bruton v United States (391 US 123) was that substantial weight would impermissibly be added to the government's case ''f a codefendant's powerfully incriminating extrajudicial statements, not subject to cross-examination by defendant, were admitted at a joint trial. The exception to the Bruton rule for "interlocking confessions" rests on the premise that where two confessions are virtually identical, the jury in assessing defendant's guilt gains little or nothing from the co-defendant's confession. But confessions do not interlock if the co-defendant's confession may be used to fill material gaps in the necessary proof against defendant.

By no stretch of the imagination can it be said that the 22-minute videotaped confession of defendant's brother to the prosecution -- inadmissible against defendant -- added no substantial weight to the government's case against defendant or did not fill material gaps in the necessary proof against him. The only direct incriminating evidence against defendant was his alleged statement to Norberto (see, People v Cruz, 119 Misc2d 1080, 1084), recapitulated in one question and answer during Norberto's brief testimony:

"Q. What did [defendant] tell you?

"A. That they had gone to give a hold up to a gas station and that he started struggling with him.

THE COURT: Excuse me, speak up. Raise your voice.

"A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station."

Norberto had a prior record; worked intermittently "on the street" as a mechanic and received welfare payments for his family of six; accepted money from his brother, Jerry, who lived with him, though he testified he had no notion of how Jerry got that money; testified earlier that Benjamin -- not defendant -- had made the confession to him; and most significantly, reported nothing of defendant's alleged statement to him for five months, until after his brother Jerry had been murdered and defendant, in Norberto's words, "tried to take me to the place where they had killed my brother."

The videotape played to the jury, by contrast, was a 22-minute depiction of the crime by defendant's own brother, explicitly detailing his role as well as defendant's. In its reliability it was so overpowering that it necessarily added credibility to Norberto's testimony, and erased the indicia of nonreliability. As an example, while Norberto in his testimony related only that Benjamin and defendant had gone to hold up the gas station, Benjamin in his confession stated that several persons, including Norberto's brother Jerry, had done many hold-ups together including the one in issue. This clear statement* of Jerry's complicity explained for the jury not only why Norberto had not come forward with defendant's statement for five months, but also why defendant and Benjamin would have gone to Jerry's residence just after the crime. The jury could hardly have avoided looking to Benjamin's confession to resolve any doubts about whether his brother had in fact confessed to Norberto.

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* Without Benjamin's vivid exposition, the only evidence to fill this logical gap is Norberto's meaningless, or at best ambiguous, comment that he did not come forward sooner because his brother "had the event."

The issue is simply whether on these facts there should have been a severance. I do not find in the prior decisions of this Court the per se rule now established by this case that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed. The rationale of Bruton is otherwise rendered meaningless. I would reverse the order below and order a new trial.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 62

THE PEOPLE OF THE STATE OF NEW YORK

- against -

EULOGIO CRUZ,

Defendant.

DECISION

Indictment #2232/82

EGGERT, J.:

The following constitutes the decision and order of the court on defendant Eulogio Cruz' motion for a mistrial and severance.

This case presents the question whether the "interlocking confessions" exception to the rule in Bruton v. United States, (391 US 123) applies when a co-defendant at a joint trial makes a confession to the authorities implicating the defendant and the defendant makes an "interlocking" admission to a private citizen acquaintance, rather than to the authorities.

Bruton (supra) holds that it is error to permit a defendant to be tried jointly with a co-defendant where the co-defendant has made a confession which will be introduced against him and which also implicates the defendant, (assuming the co-defendant does not testify). This is because the defendant has no way of cross-examining his co-defendant as to this damaging testimony, and it would be futile for the court to give instructions limiting the co-defendant's statements to the co-defendant himself.

Nevertheless, our Court of Appeals has long recognized an exception to Bruton, "where each of the defendants has

himself made a full voluntary confession which is almostidentical to the confessions of his co-defendants" (People v. McNeil, 24 NY 2d 550, 552). This exception, which was approved by a plurality of the Supreme Court of the United States in Parker v. Randolph., (442 US 62) would permit receipt of the co-defendant's confession at a joint trial, with instructions that it is evidence against the c0-defendant only.

The pertinent facts are as follows:

The two co-defendants, Benjamin and Eulogio Cruz, who are brothers, are charged with felony murder and robbery in connection with a gas station holdup in which Benjamin allegedly shot and killed the attendant while Eulogio actively participated in the holdup. The only evidence connecting Eulogio with the crime is the testimony of his acquaintance, Norberto Cruz (no relation) that shortly after the crime both Cruz brothers came to Norberto and boasted of their involvement in the holdup and admitted their full criminal liability. Many months later, after Norberto had had a falling-out with the Cruz brothers, he revealed these admissions to the police while the police were conducting another investigation. Norberto was not a suspect in this or any other crime at that time and there is no claim that he was offering these revelations in return for lenient treatment from the police. Eulogio made no statement to law enforcement authorities.

Benjamin made a statement to the police and then a more detailed statement on videotape to an Assistant District Attorney.

In his statements he admits that he was the shooter and gives a detailed account of his brother Eulogio's participation in the crime. These statements by Benjamin are being received as evidence against Benjamin at the trial. Benjamin is not testifying at the trial.

The two statements interlock fully as to the details of the crime and as to the full liability of each defendant for the crimes charged. The significant difference between the statements is as follows: While there is no dispute that Benjamin's videotaped statement was actually made, Norberto's account of his conversation with the Cruz brothers is being attacked as a fabrication.

Eulogio moved for a severance prior to trial and this Court denied the motion with leave to renew at the close of the trial evidence. At the end of the trial evidence Eulogio moved for a mistrial and renewed his motion for a severance.

To determine whether the "interlocking confessions" exception applies to confessions made under the radically different circumstances present in this case, we turn to the oft-stated rationale for this exception: "The justification for this exception is that separate confessions, without being mirror images of each other, may yet be so duplicative in their description of the crucial facts that the one of the non-testifying co-defendant may be of no measurable consequence in the face of the overwhelming and largely uncontroverted evidence

contained in the interlocking confession of the defendant himself (citations omitted)", (People v. Berzups, 49 NY2d 417, 425). Consequently, the exception only applies where the contents of the two confessions fully interlock as to the facts, or at least interlock to the extent that the defendant is unambiguously admitting criminal liability for the crime charged (People v. Berzups, supra, at 426).

For example, in People v. Smalls (55 NY 2d 407) the co-defendant made a confession in which he directly implicated the defendant as a knowing participant in the crime, while the defendant, on the other hand, made a confession which was ambiguous as to his knowing participation. The Court of Appeals held that it was error to jointly try the defendant and co-defendant and admit the co-defendant's confession because of the danger that the jury might have resolved the ambiguities in the defendant's confession by reference to the co-defendant's confession. Thus, the co-defendant's confession, which was not subject to cross-examination, would have added substantially to the case against the defendant (see also People v. Burns, 84 AD 2d 845).

It is clear that the interlocking confessions exception requires the confessions to interlock as to content. However, there does not appear to be any requirement in the case law that they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making, and

the reliability of the evidence that the confessions were actually made (see People v. Woodward, 50 NY 2d 922).

In the instant case, defendant Eulogio Cruz argues that "interlocking" as to content is not enough. Here, Eulogio contends that he never made a confession to Norberto, and claims that Norberto made up the whole story out of malice and other unworthy motives. However, in view of the videotaping, it is undisputed that Benjamin did in fact make an interlocking confession implicating Eulogio. Therefore, defendant argues that the reasoning of People v. Smalls (supra) should apply with equal force, since there is a grave danger that a jury would resolve any doubts about whether Eulogio in fact confessed to Norberto by making reference to Benjamin's video confession.

While this argument may appear to have some merit it is the same argument unsuccessfully raised by the dissenters in the leading cases which established the interlocking confessions exception at the State and Federal levels. In People v. McNeil, (supra at pp. 555-556), Chief Judge Fuld pointed out in his dissent that if there is a question about the truth or voluntariness of a defendant's confession, a jury might improperly resolve that doubt by reference to a co-defendant's confession. In Parker v. Randolph (supra at pp. 84-85), Justice Stevens' dissent posed the hypothetical situation in which a co-defendant confesses on live television and implicates the defendant, while the defendant himself makes an "interlocking confession" which is vaguely recalled by a drinking partner, former cellmate, or a divorced spouse. Notwithstanding these arguments, the highest

courts of this State and Nation have recognized an interlocking confession rule which does not depend on the reliability of the defendant's own confession.

In Tamilio v. Fogg, 546 F. Supp. 372, the petitioner argued that under Parker v. Randolph (supra), the interlocking confessions exception does not apply if the defendant attacks his own alleged confession as a fabrication. The District Court (Neaher, J.) rejected that interpretation of Parker on the grounds that it would allow any defendant to avoid the interlocking confession rule by merely disclaiming his own confession. (The court did grant habeas corpus relief on the grounds that the confessions were not fully interlocking and because the fact that the petitioner's alleged confession was a highly suspect confession to a cellmate added to the prejudice caused by the improper receipt of the co-defendant's confession at the joint trial [See People v. Santanella, 63 AD 2d 744]).

As a final note, in this case defendant Eulogio Cruz' confession to Norberto is not so utterly unreliable as to render the use of the co-defendant's videotaped confession inherently prejudicial. While Norberto, not surprisingly, made no immediate outcry about his then-friend's startling revelations, his testimony could easily have been credited beyond a reasonable doubt by a jury, regardless of the videotaped confession by Benjamin, which itself was vigorously attacked at the trial by Benjamin, who

contended that it had been coerced and staged by the police.

Accordingly, defendant Eulogio Cruz' motion for a mistrial and severance is denied.

Dated: June 10, 1983

FRED W. EGGER J.S.C.

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possibly influence the jury. It would normally be allowed, but in view of the fact that he has two other burglary convictions--granted.

mr. blitz; The charge here, pur Hnoor, I would ask the Court to dismiss that charge.

THE COURT: I'd like to hear your argument on that more detailed.

MR. BLITZ: I'm being facetious, your Honor. I"m moving for a severance in fact.

THE COURT: That' brings us to the Bruton Issue.

Now Mr. Katz, at this point, do you contemplate that your defendant will testify on the trial?

MR. KATZ: Well your Honor, ~~xxx~~ that is a possibility. I'm reserving my right, of course, based upon the People's case. If I feel the People have not ~~xxxxxx~~ met their burden, obviously I will not pu myclient on, but rest. But should something come about duringthe People's case where I feel that it is in the best interests of my client to testify, that I certainly will reserve the right to call him.

THE COURT: All right. On Bruton, Mr. Blitz, do you wish to be heard?

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MR. BLITZ: Yes, judge.

Your Honor, the testimony is that Mr. Benjamin Cruz, of whom we have seen a video tape, inculpates my client in the crime thatis charged, that' has' charged with in the indictment, and all the counts therein, your Honor. Should he not testify, I owuld have no opportunity to confront him, to cross-examine him.

Certainly, your Honor, that video tape is devestating as far as my client is concerned, and I don't see how my client could get a fair trial, even with any curative instructions to the jury to disregard it.

I don't see how they could disreg ard it in fairness, and how e could possibly not be prejudiced by the statement, should Mr. Cruz not testify on the trial itself.

At this point, your Honor, we don't nkow if he's going to testify an d certainly, your Honor, I don't want to take that risk because if he doesn't testify, I have no opportunity to cross-examine any statements that he made or anything that he may have said in the video tape.

THE COURT: Mr. Rosenblatt?

MR. ROSENBLATT: Your Honor, I just want to submit to the Court that I've turned over certain Grand Jury testimony and the People intend to call a particular witness that will testify as to what the defendant Benjamin Cruz told him, and whatthe defendant Eulogio Cruz told him in the presence of each other, and the People submit, your Honor, that we have a statement made by the defendant Benjamin Cruz to Detective Wood.

We have also a video statement of a statement made by Benjamin Cruz to A.D.A. Karen, coupled with a--with statements that were made to a third party, even though the third party wasnot a public officer or a police officer.

I respectfully submit, your Honor, that these statements made to a third party and which the third party testified before the Grand Jury, takes it out of the Bruton issue, your Honor, because they were made to a third party and I don't know of any case where it says it must be made only to a police officer or to a public official, to take it out, but what's very important, your Honor, it was made in the presence of each defendant and the People intend to be calling that particular

witness.

I want to state to the Court that I personally interviewed that witness and not only did he tell me what was more or less testified in the Grand Jury, he will go on to other matters that were not testified in the Grand Jury.

So in view of that, and in view of all these statements are somewhat interlocking, that would come under the Mac Neal cases, and the subsequent cases, they are interlocking and they are interwoven and the People feel that this situation will take it out of the Bruton problem.

THE COURT: Did each, at the time of the alleged statements that were made to the civilian that you just mentioned, were separate statements made by each defendant?

MR. ROSENBLATT: Well, these were statements that were made to my interrogation of a witness shortly thereafter the shooting and in the presence of each other.

THE OUT: That'snot my question. I'm not talking about in the presence of each other, but did each one make a separate statement?

MR. ROSENBLATT: It is my understanding of my

interrogationof the particular witness, each of them said certain things.

In otherwords, Benjamin Cruz told h this witness, ad Eulo gio Cruz told this witness something.

THECOURT: Yes, Mr. Blitz?

MR. BLITZ: Your Honor, as far as the record is concerned, there is nothing particular this Court--for this Court to make a determination. Number one, whether a statement was in fact made. Number two, whether t was made by my client. And number three, in what ~~xxxxxxxxxxxxx~~ ways it ~~xxxxxxxxxxxxx~~ could possibly be interlocking to take it out.

If anything, I believe this Court must conduct a hearing to determine whether that statement is in ~~xxxxx~~ interlocking, whether it was x fact made by my client, x and what was alleged to have been said by my client. There is nothing in the record to ~~xxx~~ show that a statement had been amde for what that statement contained, your Honor.

TH COURT: Well, since there appears to x be a questionof fact on whether or not it's interlocking, the Court will reserve decidion on the Bruton Issue.

We;ll research with the joint trial, but I'm reserving on your motion, Mr. Blitz.

MR. BLITZ: All right.

THE COURT: All right. Gentlemen, how do we stand with the jury panel?

COURT CLERK: Should be ready.

THE COUT: All right. Send for them, please.

(Hearing concluded)

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT FROM MY STENOGRAPHIC NOTES.

Kenneth A. De Corso, C.S.R.

SENIOR COURT REPORTER

thereof is denied.

The Court believesthat there is sufficient evidence here to warrant submission to the jury.

MR. BLITZ: At this time, your Honor, I respectfully move for a mistrial. If I rested now, the jury would have before it, the testimony and the video tape of Benjamin Cruz, and despite your Honor's curative instructions and the testimony of Ronda, the Spanish Interpreter of Wood, of all the statements allegedly made by Mr. Benjamin Cruz. Despite your Honor's curative is instructions, how could the jury possibly put that out of his mind, out of their minds and how could they --- my client possibly get a fair trial?

It certainly is a Bruton situation that cannot be compared as two separate statements, your Honor, or interlocking statements. This is a video tape of a co-defendant, and I don't see how the jury can deliberate and put that out of their mind and deliberate solely on what was presented against my client.

I respectfully move for a mistrial.

THE COURT: Mr. Rosenblatt.

MR. ROSENBLATT: I just want to state, your

Honor, that as Mr. Blitz said, is true of the video tape. But in this situation, your Honor, we go a step further. We have an independent witness that has testified and given evidence to this Court, in which he stated that both Benjamin Cruz told him what happened on that morning and what happened is what Eulogio Cruz told him in the presence of each other, Judge, and that all three were present, and they both describe as to the incident, and what they were doing; that they were going to rob this gasoline station, and during the struggle, between Eulogio Cruz and the deceased, that this defendant, Benjamin Cruz, did shoot and kill the deceased.

Now, both of these statements of their complicity that both of these defendants were told to the witness and in their presence, I respectfully submit, your Honor, that this takes out of the Bruton situation because the whole thing is part and parcel of one transaction, more or less, and that this case does not fall within the Bruton theory of severence

THE COURT: While counsel has moved for a mistrial, I assume, actually, it's a motion for a severence, insofar as the defendant, Eulogio Cruz,is concerned.

MR. BLITZ: It's too late for a severence now, your Honor.

THE COURT: Pardon?

MR. BLITZ: It's too late for a severence now.

THE COURT: No, it's not.

The motion for a mistrial is denied.

We have testimony here by the defendant, Benjamin Cruz inculpating the defendant, Eulogio Cruz. On each occasion that the defendant, Benjamin Cruz, made those statements, the Court gave an immediate curative instruction. In fact, it gave such instructions to the jury, approximately, five or six times. I am aware of course, of various cases hold that curative instructions are insufficient for what's real stick about it. However, we have more than just the statement of the defendant, Benjamin Cruz. There was the testimony of Norberto Cruz, who is not a defendant in this action, but who testified to inculpatory statement made by the defendant Eulogio Cruz as well as the defendant Benjamin Cruz.

Cases do not require that the interlocking statements interlock in every element. It's pointed out in the Bursoff case (Phonetic), in both statements the defendants each put themselves at the scene of the

crime and indicated a common participation in the crime; and the Court in Sursoff's(Phonetic) case held that that was sufficient, even though there could be minor differences in the statements. So, it would appear here that there is four interlocking --- There are interlocking confessions, but nonetheless, I previously have denied your motion, Mr. Blitz, for a severence, conditionally, pending on certain further testimony.

I will again deny your motion for a severence conditionally pending further testiony in this case.

MR. BLITZ: Exception, your Honor.

THE COURT: The motion for a mistrial is denied. The motion for a severence is denied conditionally, as indicated.

Now, you may have some witnesses tomorrow, Mr. Katz.

MR. KATZ: I anticipate, your Honor, if the calls went through. Mr. Rosenblatt indicated that they have Detectives Tonnelli, Police Officer Zuba. I anticipate each one of their testimony to be ten or fifteen minutes, at most, depending upon cross and also, I will probably call defendant Cruz's mother, Miss Ramos. The Court has already heard that testimony and how long that would take. We have

burden of proving these defendants guilty beyond a reasonable doubt.

THE COURT: Motion for a trial order of dismissal of the indictment at the end of the entire case upon the ground that the trial evidence is not legally sufficient to establish the offenses charged or any lesser included offenses thereof, is denied, and the Court believes that there is sufficient evidence in this case to warrant submission to the jury.

MR. BLITZ: Exception, your Honor.

At this time, I again renew my motion for a mistrial, your Honor, and a severence and/or a severence your Honor, based upon the arguments I've given before and ask the Court ro rule on that at this time.

THE COURT: That motion is denied for the reasons set forth in the Court's ruling on a prior similar motion made yesterday or the day before.

MR. BLITZ: The other way, your Honor said it was conditionally denied.

THE COURT: Yes.

MR. BLITZ: Is it still conditionally denied?

THE COURT: No, it's denied for all purposes. Unconditionally.

MR. BLITZ: Exc pt, your Honor.

[illegible], your Honor.

[illegible] stipulating?

MR. KATZ: I am stipulating.

THE COURT: With that objection noted, anything else?

MR. ROSENBLATT: Excuse me, your Honor, if I recall, maybe Mr. Katz-- I believe both counsel stipulated during the last trial.

THE COURT: Is there any question? Do you object to the tape going into evidence, is that correct?

MR. BLITZ: Yes, Judge.

THE COURT: Do you object to the redactions?

MR. BLITZ: To the redactions, no.

THE COURT: All right. Let's proceed now.

Did you offer this for evidence?

MR. ROSENBLATT: Yes, I offer it for evidence as People's exhibit [illegible] a technician in Court, your Honor. He can set

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

NO. 85-5939

EULOGIO CRUZ,

Petitioner,

- against -

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

MARIO MEROLA
District Attorney
Bronx County
Attorney for Respondent

STEVEN R. KARTAGENER
MARK L. FREYBERG
Assistant District Attorneys

Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EULOGIO CRUZ,

Petitioner,

- against -

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the New York Court of Appeals' decision in this case.

QUESTION PRESENTED

Whether a writ of certiorari should issue to review a decision of the New York Court of Appeals, which correctly applied the standard promulgated by this Court for determining whether confessions made by multiple criminal defendants are interlocking, thus allowing the defendants to be tried jointly.

STATEMENT OF THE CASE

The Indictment

On June 11, 1982, the Grand Jury of Bronx County filed an eleven-count indictment charging petitioner with the crimes of Murder in the Second Degree (two counts), Robbery in the First Degree (two counts), Robbery in the Second Degree, Criminal Possession of a Weapon in the Second Degree (two counts), Criminal Use of a Firearm in the Second Degree (two counts), and Criminal Use of a Firearm in the First Degree (two counts). Bronx County Indictment Number 2232 of 1982.

The Pretrial Motion And First Trial

Between May 25 and 30, 1983, before The Honorable Fred Eggert, petitioner's co-defendant and brother, Benjamin Cruz, moved to suppress his videotaped statement to an assistant district attorney on the ground that the statement was involuntary. Following the denial of this motion, petitioner moved to sever his case from his brother's. Petitioner argued that if Benjamin's confession were admitted at a joint trial and if Benjamin did not testify, he would be denied his right to confrontation. In opposition, the People asserted that petitioner himself made a confession to a private citizen, Norberto Cruz (no relation), which fully "interlocked" with the co-defendant's statement. Thus, the prosecutor contended, the rule announced in Bruton v. United States, 391 U.S. 123 (1968) would not be violated by a joint trial. Justice Eggert reserved decision on the severance motion pending the receipt of trial testimony.

At the first trial, petitioner renewed the Bruton motion which

Justice Eggert denied. In a written decision dated June 10, 1983 [People v. Cruz, 119 Misc.2d 1080,465 NYS.2d 419 (Sup. Ct. Bx Cty 1983)], the court found that the statements of the Cruz brothers "interlock fully as to the details of the crime and as to the full liability of each defendant for the crimes charged". Thus, the court denied petitioner's motion for a separate trial.

The Mistrial

During the jury's deliberations, at the end of the first trial, petitioner moved for a mistrial on the grounds that one of the jurors was becoming violent and insisting on petitioner's guilt for reasons unrelated to the trial evidence. Finding "manifest necessity" for a mistrial, Justice Eggert granted petitioner's motion.

THE SECOND TRIAL

The People's Case

On November 29, 1981, at 5:20 a.m., Victoriano Agostini was found dead, lying in a pool of blood at the Gaseteria service station, which he attended on 149th Street and Prospect Avenue in The Bronx. Later that morning, at approximately 10:00, petitioner and his brother, co-defendant Benjamin Cruz, visited their lifelong friend, Norberto Cruz (no relation), at the latter's apartment in The Bronx. Petitioner, who was nervous and wore a blood-stained bandage around his right forearm, told Mr. Cruz that he and his brother had robbed a gas station. Petitioner stated further that he had struggled with the station attendant, and that during the fight the attendant bent down, procured a gun, and shot him. In response, petitioner continued, petitioner's brother Benjamin jumped up and fired at the attendant.

After Benjamin gave Norberto Cruz a similar account of the robbery/shootout, Mr. Cruz offered to take petitioner to the hospital for treatment of his wound. Petitioner declined his friend's overture, reasoning that a hospital visit under the circumstances would be too dangerous.

Petitioner and his brother then left with Mr. Cruz' brother Jerry.

The next day, November 30, 1981, petitioner's brother Benjamin returned to Norberto Cruz' apartment, this time alone, at approximately 4:00 p.m. At this time, Benjamin advised Norberto to clean the blood out of Jerry Cruz' car because it would be dangerous to leave the car in that condition.

An autopsy, performed on Victoriano Agostini the following day, revealed that he died from two gunshot wounds to the head. One of the bullets entered Mr. Agostini's head above his right ear from a distance of three to six inches. The second wound entered the left front part of the victim's head, and followed a downward and backward path to the right rear part of the head. Additionally, blunt force injuries were found on the bridge of Mr. Agostini's nose, around his eyes, on his right cheek and on his left shoulder.

Approximately four months after Mr. Agostini's death, Jerry Cruz, Norberto Cruz' brother, was killed. When Detective George Wood was investigating the Jerry Cruz homicide, he spoke to Norberto several times in March and April, 1982. On April 27, 1982, Norberto informed Detective Wood of petitioner's and his brother Benjamin's visit on the day of Victoriano Agostini's death.

Six days later, on May 3, 1982, Detective Wood was contacted by petitioner's brother Benjamin concerning the Jerry Cruz homicide. While speaking about that incident, Benjamin suddenly admitted that he had shot a man who had fired at petitioner in a gas station on 149th Street. After hearing his Miranda warnings, Benjamin agreed to speak to an assistant district attorney, on videotape, about the Agostini homicide.

Benjamin Cruz admitted to Assistant District Attorney Allen Karen that he and petitioner held up a gas station in November, 1981. When the attendant resisted, petitioner hit him with a gun on the top of his nose and a struggle ensued. The attendant managed to reach a gun and shot petitioner in the arm, after which Benjamin shot the attendant in the head. Benjamin and petitioner then fled with $62.00 in a car driven by Jerry Cruz.

The Defense

Petitioner presented no witnesses or evidence on his own behalf. Co-defendant Benjamin Cruz called his mother (petitioner's step-mother) who testified that Benjamin received psychiatric treatment in Puerto Rico.

The Verdict And Sentence

Following the trial evidence and the court's instructions, a jury found petitioner guilty of Murder in the Second Degree [New York Penal Law section 125.25(3)]. Thereafter, Bronx County Supreme Court Justice Joseph Cerbone sentenced petitioner to an indeterminate term of imprisonment of from fifteen years to life.

The State Court Appeals

On direct appeal from his conviction, in the Appellate Division of the New York Supreme Court, First Department, petitioner argued that the admission of his brother's confession violated his rights under the Confrontation Clause as interpreted by this Court in Bruton v. United States, 391 U.S. 123 (1968), as well as his rights pursuant New York State fair trial standards for trials involving multiple defendants. On October 25, 1984, the Appellate Division unanimously affirmed petitioner's conviction without opinion. People v. Cruz, 104 A.D.2d 1060 (1st Dept. 1984). Subsequently, on January 3, 1985, the Honorable Bernard S. Meyer, Associate Judge of the New York Court of Appeals, granted petitioner leave to appeal his conviction to that Court. People v. Cruz, 64 N.Y.2d 779 (1985).

On October 17, 1985, the New York Court of Appeals, by a four to two vote, affirmed the order of the Appellate Division. People v. Cruz, 66 N.Y.2d 61, 485 N.E.2d 221 (1985). Relying on this Court's plurality opinion in Parker v. Randolph, 442 U.S. 62 (1979), the majority held that the interlocking confession exception to the Bruton rule applies regardless of differences in the reliability of the respective statements.

ARGUMENT

POINT

A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW A DECISION OF THE NEW YORK COURT OF APPEALS WHICH CORRECTLY APPLIED THE STANDARD PROMULGATED BY THIS COURT FOR DETERMINING WHETHER CONFESSIONS MADE BY MULTIPLE DEFENDANTS ARE INTERLOCKING.

In Bruton v. United States, 391 U.S. 123 (1968), the Court held that two defendants cannot be jointly tried where one has made a confession which implicates the other, and the confessing defendant does not testify. Seeking issuance of a writ of certiorari, petitioner correctly tallies a four-four split of the Court in Parker v. Randolph, 442 U.S. 62 (1979): a four-justice plurality holding that the Court's decision in Bruton v. United States does not apply to cases where all defendants have given interlocking confessions, and the remaining justices, one in a concurring opinion and three in dissent, stating that Bruton should bar a joint trial even in an interlocking confession case, thereby altering the focus to whether the Bruton error is harmless. Petitioner also correctly points out a post-Parker split in the Circuit Courts of Appeals, some circuits following the plurality reasoning and others adhering to that of the concurrence and dissent. The point petitioner misses, however, is that the split of authority concerning the applicable analysis is overshadowed by the consistent results reached regardless of which approach is used. Much like the outcome of a grand debate over whether twelve o'clock midnight is the beginning or end of a day, therefore, the proper answer to petitioner's Bruton riddle is: it just doesn't matter.

Every member of the Court who addressed the question in Parker v. Randolph, supra, found the joint trial of Randolph, Pickins and Hamilton to be proper: the plurality, through its position that Bruton had no application to an interlocking confession trial and the concurrence through its opinion that the Bruton error was harmless. The dissenting justices never reached the issue because they deemed the Court bound by the lower courts' determinations that the Bruton error was not harmless. Parker v. Randolph,

442 U.S. at 81-82. Therefore, the very decision from which petitioner alleges such confusion has emanated, was itself a unanimous one regarding the ultimate propriety of the joint trial.

More illustrative of the much-ado-about-nothing quality of the issue presented herein, is the uniformity in the results of the Circuit Courts of Appeals. Regardless of the analysis employed, joint trials, in which all defendants confessed to the charges and their statements made out the same elements of the crime, have been upheld. Similarly, where one defendant's confession is more damaging legally, the statements have been found non-interlocking, and the convictions have been reversed as they would have been by any member of the Parker Court.

Examples, using the circuit court cases relied on by petitioner (petition, p. 9), abound. United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984), a case which, petitioner correctly notes, has adopted the Parker plurality analysis, affirmed the defendants' convictions since their confessions each made out all of the elements of the crime charged. 731 F.2d at 1518-1519. Conversely, United States v. Parker, 622 F.2d 298 (8th Cir. 1980), a decision which adheres to the harmless error approach advanced by the Parker concurrence and dissent, reversed the convictions of defendants Parker and Todd since, unlike defendant Ward's statement, their confessions failed to make out the elements of murder and thus were less legally inculpatory. 622 F.2d at 301-304. The conclusion to be drawn, therefore, is the one set forth in another decision relied on by petitioner, namely that "[w]e need not decide which of the two approaches in Parker should govern this case: under either approach, [petitioner's] conviction was constitutionally sound." Montes v. Jenkins, 626 F.2d 584,587 (7th Cir. 1980).

Indeed, petitioner Eulogio Cruz' conviction was "constitutionally sound." In keeping with Parker v. Randolph and the circuit court decisions, the New York Court of Appeals required of petitioner's confession that its content be "substantially similar" to his co-defendant's, and upheld

petitioner's conviction because both statements "cover[ed] all major elements of the crime involved. . ." People v. Cruz, 66 N.Y.2d 61,70, 485 N.E.2d 221,226 (1985). Contrary to petitioner's assertion [petition, p. 10], therefore, even under the standard advanced in the Parker concurrence, no Bruton violation occurred here.

After "fully recogniz[ing] that in most interlocking-confession cases, any error in admitting the confession of a non-testifying co-defendant will be harmless beyond a reasonable doubt" [422 U.S. at 79], Justice Blackmun, in his concurrence, found harmless any Bruton error in conducting a joint trial where, unlike the two other defendants, defendant Pickins made a written confession in addition to an oral one. Implicitly rejecting petitioner's argument that disparate reliability renders two confessions non-interlocking, the concurrence surely would find harmless any error in the joint trial here, where "the Cruz brothers agreed, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how [petitioner] was injured and the station attendant killed" People v. Cruz, 66 N.Y.2d at 71, 485 N.E.2d at 227.

Appreciated by the Parker Court and other authorities is the fact that the potential problems in this area of the law arise when the "interlocking" is incomplete. For example, the Parker dissent posed a hypothetical situation where one defendant confesses to the planning and execution of a murder, while his co-defendant merely admitted his presence at the crime scene. 422 U.S. at 84-85. Likewise, the commentator cited by petitioner as labeling the Parker decision "inconclusive" [petition, p. 9], criticized that case based on his belief that it casts Bruton aside when a co-defendant makes "any inculpatory statement." Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich. L. Rev. 1379, 1421 (1979). However, as the Parker plurality stated, an inculpatory statement does not a confession make. 422 U.S. at 75, n. 8. Indeed, the New York Court of Appeals in the instant case, relying on this

portion of the Parker decision, took issue with the Michigan Law Review analysis relied on by petitioner. 66 N.Y.2d at 70, 485 N.E.2d at 226. Therefore, in a case such as the one at bar, where the same facts are admitted by each defendant, and each statement makes out every element of felony murder, there is no doubt that the statements are fully interlocking and that the joint trial was proper under Parker.

Of course, it is not surprising that, so long as substantial similarity in the statements' content is required, the results of a case will be the same regardless of which Parker analysis is utilized. After all, "[t]he interlocking confession doctrine is closely related to the doctrine of harmless error." Tamilio v. Fogg, 713 F.2d 18,21 (2d Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 706 (1984). However, even if one imagines a joint trial where fully interlocking confessions are admitted, and deemed a prejudicial Bruton error, such a scenario is not presented herein. Petitioner's confession, as recognized by the New York Court of Appeals, was corroborated by an array of "police testimony, forensic evidence and photographs which established the robbery and the killing, the location of the victim's body, the injuries to his face and the substantial damage to the office. . ." Additionally, "medical evidence of the trajectory of the bullets as they entered the victim's head" supported petitioner's statement that his brother was above the attendant when he (the brother) shot him. 66 N.Y.2c at 66, 485 N.E.2d at 223-224. Therefore, even if this Court deems it advisable to garner majority support for one of the Parker rationales, it should await a case in which the result hangs in the balance. R. Stein and E. Gressman, Supreme Court Practice 270 (5th ed. 1978).*

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* In addition to his argument that his confession was less reliable than the co-defendant's, petitioner contends that the co-defendant's statement "filled in a logical gap in [respondent's] case" (petition, p. 11). The gaps petitioner refers to are an explanation of why the individual to whom he confessed remained silent for five months and why petitioner and his brother went to this person's home after the murder. Initially, these arguments were presented to two State Appellate Courts in support of petitioner's separate contention that his trial "violated fair trial standards applicable to trials in

Footnote continued on next page

In sum, application of either of the two approaches advanced in Parker v. Randolph will most often, if not always, lead to the same result. A writ of certiorari should not issue, therefore, simply to announce the Court's preference for one of the Parker analyses. Certainly in this case, where the joint trial was proper under either Parker view, Supreme Court review is unnecessary.

Footnote continued:
New York involving multiple defendants" 66 N.Y.2d at 72, 485 N.E.2d at 228. Since petitioner's federal constitutional argument was not put forth in the state courts, petitioner should not be heard to raise it for the first time herein. Steagald v. United States, 451 U.S. 204,209 (1981). Furthermore, the gaps petitioner complains of were not essential to the state's case, and thus their inclusion at petitioner's trial cannot be said to have violated his rights under the confrontation clause. Tamilio v. Fogg, supra, 713 F.2d at 21. Additionally, as the New York Court of Appeals stated in response to the "logical gap" claim, any prejudice to petitioner "resulted not from the fact that [the co-defendant's] statement added substantial weight to the proof of [petitioner's] guilt, but from the fact that the denial of a severance prevented [petitioner] from obtaining a more favorable atmosphere in which to attack his confession. That may have harmed his case tactically, but it did not deny his fundamental right to a fair trial." 66 N.Y.2d at 73, 485 N.E.2d at 228.

CONCLUSION

A WRIT OF CERTIORARI SHOULD NOT ISSUE.

MARIO MEROLA
District Attorney
Bronx County
Attorney for Respondent

STEVEN R. KARTAGENER
MARK L. FREYBERG
Assistant District Attorneys

Of Counsel

February 1986

bb.

No. 85-5939

In the Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ, PETITIONER

v.

NEW YORK, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JOINT APPENDIX

PHILIP L. WEINSTEIN *
ROBERT S. DEAN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Counsel for Petitioner

MARIO MEROLA *
District Attorney
Bronx County
PETER D. CODDINGTON
LEE S. GAYER
Assistant District Attorneys
215 East 161st Street
Bronx, New York 10451
(212) 590-2060
Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1985
CERTIORARI GRANTED JUNE 9, 1986

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
May 13, 1982	—Indictment No. 1793/82 is filed against Benjamin Cruz in New York State Supreme Court, Bronx County.
June 11, 1982	—Indictment No. 2232/82 is filed against petitioner Eulogio Cruz in New York State Supreme Court, Bronx County.
May 9, 1983	—The People move to consolidate the two indictments for trial.
May 23, 1983	—Justice Joseph Cohen orders the indictments consolidated for trial.
May 31, 1983	—Eulogio Cruz moves prior to trial to sever his case from that of Benjamin Cruz. Justice Fred W. Eggert reserves decision.
June 7, 1983	—The first joint trial of Eulogio Cruz and Benjamin Cruz commences before Justice Eggert and a jury.
June 10, 1983	—Justice Eggert issues an order and opinion denying Eulogio Cruz's motion to sever.
June 14, 1983	—Justice Eggert declares a mistrial upon manifest necessity.
September 26, 1983	—Prior to the second trial, Justice Joseph A. Cerbone issues an order and opinion denying Eulogio Cruz's renewed motion to sever.
September 27, 1983	—The second joint trial of Eulogio Cruz and Benjamin Cruz commences before Justice Cerbone and a jury.
October 5, 1983	—The jury finds both defendants guilty of murder in the second degree.

Date	Proceedings
October 31, 1983	—The court imposes judgment sentencing Eulogio Cruz to 15 years to life in prison. Eulogio Cruz files a notice of appeal from the judgment.
December 15, 1983	—Eulogio Cruz is granted leave to appeal as an indigent.
October 11, 1984	—Eulogio Cruz's appeal is argued before a panel of the New York State Supreme Court, Appellate Division, First Department.
October 25, 1984	—The New York Supreme Court, Appellate Division, First Department, affirms Eulogio Cruz's judgment of conviction without opinion.
January 3, 1985	—Judge Bernard S. Meyer, Associate Judge of the Court of Appeals, grants Eulogio Cruz leave to appeal to the Court of Appeals.
February 5, 1985	—Eulogio Cruz is granted leave to appeal to the New York Court of Appeals as an indigent.
September 9, 1985	—Eulogio Cruz's appeal is argued before the New York Court of Appeals.
October 17, 1985	—The New York Court of Appeals affirms the order of the New York Supreme Court, Appellate Division. Judges Judith Kaye and Bernard S. Meyer dissent from the court's decision.

INDICTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Indictment No. 2232/1982

THE PEOPLE OF THE STATE OF NEW YORK

Against

X. EULOGIO MEDINA CRUZ—AFO, VFO
AKA EULOGIO CRUZ MEDINA, DEFENDANT

COUNTS

Murder in the Second Degree 125.25 (2 Counts)

Robbery in the First Degree 160.15 (2 Counts)

Robbery in the Second Degree 160.10

Criminal Possession of a Weapon in the Second Degree 265.03 (2 Counts)

Criminal Use of a Firearm in the Second Degree 265.08 (2 Counts)

Criminal Use of a Firearm in the First Degree 265.09 (2 Counts)

Date Voted: 6-2-82

Date Filed: 6-11-82

A True Bill

/s/ Jon Doody
Foreman

MARIO MEROLA
District Attorney

FIRST COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of murder in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, with intent to cause the death of Victoriano Agostini, caused the death of Victoriano Agostini by shooting him with deadly weapons, to wit; loaded pistols.

SECOND COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of murder in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed the crime of robbery, and in the course of and in furtherance of such crime and of immediate flight therefrom, caused the death of Victoriano Agostini he being other than a participant, by shooting him with deadly weapons to wit: loaded pistols.

THIRD COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of robbery in the first degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, forcibly stole certain property, to wit: a quantity of United States currency from Victoriano Agostini, and in the course of the commission of the crime and of immediate flight therefrom, the defendant and aforesaid other persons caused serious physical injury to Victoriano Agostini who was not a participant in the crime.

FOURTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of robbery in the first degree, committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, forcibly stole certain property, to wit: a quantity of United States currency from Victoriano Agostini, and in the course of the commission of the crime and of immediate flight therefrom, the defendant and aforesaid other persons were armed with deadly weapons, to wit: loaded pistols.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

FIFTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of robbery in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, being actually present, forcibly stole certain property, to wit: a quantity of United States currency from Victoriano Agostini.

SIXTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal possession of a weapon in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, knowingly and unlawfully possessed a loaded firearm, to wit: a pistol, with intent to use unlawfully against another.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

SEVENTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal possession of a weapon in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, knowingly and unlawfully possessed a loaded firearm, to wit: a pistol, with intent to use unlawfully against another.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

EIGHTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal use of a firearm in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed a class C violent felony offense as defined in paragraph (B) of subdivision one of section 70.02 of the penal law, the defendant and aforesaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

NINTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal

use of a firearm in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed a class C violent felony offense as defined in paragraph (B) of subdivision one of section 70.02 of the penal law, the defendant and aforesaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

TENTH COUNT

The Grand jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal use of a firearm in the first degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed a class B violent felony offense as defined in paragraph (A) of subdivision one of section 70.02 of the penal law, the defendant and foresaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

ELEVENTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal use of a firearm in the first degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx,

having committed a class B violent felony offense as defined in paragraph (A) of subdivision one of section 70.02 of the penal law, the defendant and aforesaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

MARIO MEROLA
District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Indictment No. 1793/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

BENJAMIN CRUZ, DEFENDANT

Indictment No. 2332/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EULOGIO MEDINA CRUZ
AKA EULOGIO CRUZ MEDINA, DEFENDANT

NOTICE OF MOTION FOR ORDER CONSOLIDATING THESE TWO (2) SEPARATE INDICTMENTS

SIR:

PLEASE TAKE NOTICE, that upon the annexed affirmation of NATHAN D. ROSENBLATT, Assistant District Attorney of Bronx County, dated May 9, 1983, and all the proceedings previously had, the People of the State of New York will move this Court at Part 40 thereof, at the Courthouse located at 851 Grand Concourse, Bronx, New York on the 23rd day of May, 1983 at 9:30 A.M. or as soon thereafter as Counsel may be heard, for an order pursuant to Criminal Procedure Law,

Section 200.40 (2) directing that Indictment #1793/82 (People vs. Benjamin Cruz and Indictment #2332/82 (People vs. Eulogio Medina Cruz) be consolidated for trial and for such other and further relief as this Court may seem just and proper.

Dated: Bronx, New York
May 9, 1983

Yours, etc.

MARIO MEROLA
District Attorney
Bronx County

By: /s/ Nathan D. Rosenblatt
NATHAN D. ROSENBLATT
Assistant District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[Title Omitted in Printing]

AFFIRMATION IN SUPPORT OF MOTION TO CONSOLIDATE TWO (2) SEPARATE INDICTMENTS

NATHAN D. ROSENBLATT, under penalty of perjury and pursuant to C.P.L.R., 2106 hereby states and affirms:

That I am an Assistant District Attorney in the office of Mario Merola, District Attorney of Bronx County and I make this affirmation in support of the annexed notice of motion for an order directing the consolidation of indictments 1793/82 and 2232/82 for trial.

That on May 13, 1982, Mr. Benjamin Cruz was indicted for two counts of Murder in the Second Degree, two counts of Robbery in the First Degree, one count of Robbery in the Second Degree, Criminal Possession of a Weapon in the Second Degree; Criminal Use of a Firearm in the Second Degree and Criminal Use of a Firearm in the First Degree under indictment #1783/82.

That on June 11, 1982, Mr. Eulogio Medina Cruz was indicted for Two Counts of Murder in the Second Degree, Two counts of Robbery in the First Degree, Robbery in the Second Degree, two counts of Criminal Possession of a Weapon in the Second Degree. Two counts of Criminal Use of a Firearm in the Second Degree; two counts of a Firearm in the First Degree under indictment #2232/82.

People consent to dismiss the Seventh, Ninth and Eleventh counts of indictment 2232/82.

Copies of both indictments are annexed hereto as People's exhibits "I" and "2".

That these indictments charge each defendant with acting in concert with other persons in causing the death of Victoriano Agostini on November 29, 1981 and with

the same Criminal Possession and use of the same weapon.

That the crimes charged against Benjamin Cruz and Mr. Eulogio Medina Cruz of the same incident.

That Mr. Benjamin Cruz was arrested on May 3, 1982 and Mr. Eulogio Medina Cruz was arrested on April 14, 1983. As a result, Mr. Benjamin Cruz was indicted prior to Eulogio Medina Cruz.

That the witnesses in each indictment are substantially the same.

That the crimes charged in each indictment are identical and arise out of the exact same incident involving the same victim Victoriano Agostini.

That having to call numerous witnesses to testify at two trials would constitute an undue hardship which could be avoided with one trial since the witnesses are the same in each case.

That two trials would require excessive use of court time and cause great expense to the People of Bronx County.

That a single trial would insure each defendant a speedy trial and early disposition of each of the aforementioned indictments. Further, each defendant is remanded.

That no previous application for the relief prayed for herein has been made to this or any court.

WHEREFORE, the People respectfully request that the aforementioned two (2) indictments be consolidated and that a joint trial be ordered thereon, together with such other and further relief as this court may seem just and proper.

Dated: Bronx, New York
May 9, 1983

Respectfully submitted,

/s/ Nathan D. Rosenblatt
NATHAN D. ROSENBLATT
Assistant District Attorney

[Affidavit of Service Omitted in Printing]

NEW YORK SUPREME COURT
PART 60 (40)—COUNTY BRONX

Indictment Numbers 1793, 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

BENJAMIN CRUZ, DEFENDANT

ORDER CONSOLIDATING INDICTMENTS

Present:

HON. JOSEPH COHEN
J.S.C.

Upon the foregoing papers this Motion is disposed of as follows: 1) Counts 7, 9 & 11 of Indict. 2232 of 1982 are dismissed. 2) Both indictments are consolidated for trial.

Opinion filed,
Dated 5/23/83

JOSEPH COHEN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 62

Ind. Nos. 1793, 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

v.

BENJAMIN CRUZ & EULOGIO MEDINA CRUZ, DEFENDANTS

Before: Hon. Fred Eggert, Justice

TRANSCRIPT OF PROCEEDINGS,
FIRST TRIAL

May 31, 1983
851 Grand Concourse
Bronx, New York

Proceedings

* * * *

Colloquy

* * * *

[120] MR. BLITZ: I'm being facetious, your Honor. I'm moving for a severance in fact.

THE COURT: That' brings us to the Bruton Issue.

Now Mr. Katz, at this point, do you contemplate that your defendant will testify on the trial?

MR. KATZ: Well your Honor, that is a possibility. I'm reserving my right, of course, based upon the People's

case. If I feel the People have not met their burden, obviously I will not pu myclient on, but rest. But should something come about duringthe People's case where I feel that it is in the best interests of my client to testify, that I certainly will reserve the right to call him.

THE COURT: All right. On Bruton, Mr. Blitz, do you wish to be heard?

[121] MR. BLITZ: Yes, judge.

Your Honor, the testimony is that Mr. Benjamin Cruz, of whom we have seen a video tape, inculpates my client in the crime thatis charged, that' hes' charged with in the indictment, and all the counts therein, your Honor. Should he not testify, I owuld have no opportunity to confront him, to cross-examine him.

Certainly, your Honor, that video tape is devastating as far as my client is concerned, and I don't see how my client could get a fair trial, even with any curative instructions to the jury to disregard it.

I don't see how they could disreg ard it in fairness, and how e could possibly not be prejudiced by the statement, should Mr. Cruz not testify on the trial itself.

At this point, your Honor, we don't nkow if he's going to testify an d certainly, your Honor, I don't want to take that risk because if he doesn't testify, I have no opportunity to cross-examine any statements that he made or anything that he may have said in the video tape.

THE COURT: Mr. Rosenblatt?

[122] MR. ROSENBLATT: Your Honor, I just want to submit to the Court that I've turned over certain Grand Jury testimony and the People intend to call a particular witness that will testify as to what the defendant Benjamin Cruz told him, and whatthe defendant Eulogio Cruz told him in the presence of each other, and the People submit, your Honor, that we have a statement made by the defendant Benjamin Cruz to Detective Wood.

We have also a video statement of a statement made by Benjami nCruz to A.D.A. Karen, coupled with a—

with statements that were made to a third party, even though the third party wasnot a public officer or a police officer.

* * * *

[123] So in view of that, and in view of all these statements are somewhat interlocking, that would come under the Mac Neal cases, and the subsequent cases, they are interlocking and they are interwoven and the People feel that this situation will take it out of the Bruton problem.

THE COURT: Did each, at the time of the alleged statements that were made to the civilian that you just mentioned, were separate statements made by defendant?

MR. ROSENBLATT: Well, these were statements that were made to my interrogation of a witness shortly thereafter the shooting and in the presence of each other.

THE OUT: That'snot my question. I'm not talking about in the presence of each other, but did each one make a separate statement?

MR. ROSENBLATT: It is my understanding of my [124] interrogationof the particular witness, each of them said certain things.

In other words, Benjamin Cruz told this witness, ad Eulo gio Cruz told this witness something.

THE COURT: Yes, Mr. Blitz?

MR. BLITZ: Your Honor, as far as the record is concerned, there is nothing particular this Court—for this Court to make a determination. Number one, whether a statement was in fact made. Number two, whether it was made by my client. And number three, in what ways it could possibly be interlocking to take it out.

If anything, I believe this Court must conduct a hearing to determine whether that statement is interlocking, whether it was in fact made by my client, and what was alleged to have been said by my client. There is nothing in the record to show that a statement had been amde for what that statement contained, your Honor.

THE COURT: Well, since there appears to be a question of fact on whether or not it's interlocking, the Court will reserve decision on the Bruton Issue.

[125] We'll research with the joint trial, but I'm reserving on your motion, Mr. Blitz.

* * * *

June 9, 1983

Proceedings.

* * * *

Colloquy

* * * *

[277] MR. BLITZ: At this time, your Honor, I respectfully move for a mistrial. If I rested now, the jury would have before it, the testimony and the video tape of Benjamin Cruz, and despite your Honor's curative instructions and the testimony of Ronda, the Spanish Interpreter of Wood, of all the statements allegedly made by Mr. Benjamin Cruz. Despite your Honor's curative is instructions, how could the jury possibly put that out of his mind, out of their minds and how could they—my client possibly get a fair trial?

It certainly is a Bruton situation that cannot be compared as two separate statements, your Honor, or interlocking statements. This is a video tape of a co-defendant, and I don't see how the jury can deliberate and put that out of their mind and deliberate solely on what was presented against my client.

I respectfully move for a mistrial.

THE COURT: Mr. Rosenblatt.

MR. ROSENBLATT: I just want to state, your [278] Honor, that as Mr. Blitz said, is true of the video tape. But in this situation, your Honor, we go a step further. We have an independent witness that has testified and given evidence to this Court, in which he stated that both Benjamin Cruz told him what happened on that morning and what happened is what Eulogio Cruz told him in the presence of each other, Judge, and that all three were present, and they both describe as to the incident, and what they were doing; that they were going to rob this gasoline station, and during the struggle, between Eulogio Cruz and the deceased, that this defendant, Benjamin Cruz, did shoot and kill the deceased.

Now, both of these statements of their complicity that both of these defendants were told to the witness and in

their presence, I respectfully submit, your Honor, that this takes out of the Bruton situation because the whole thing is part and parcel of one transaction, more or less, and that this case does not fall within the Bruton theory of severence

THE COURT: While counsel has moved for a mistrial, I assume, actually, it's a motion for a severence, insofar as the defendant, Eulogio Cruz, is concerned.

[279] MR. BLITZ: It's too late for a severence now, your Honor.

THE COURT: Pardon?

MR. BLITZ: It's too late for a severence now.

THE COURT: No, it's not.

The motion for a mistrial is denied.

We have testimony here by the defendant, Benjamin Cruz inculpating the defendant, Eulogio Cruz. On each occasion that the defendant, Benjamin Cruz, made those statements, the Court gave an immediate curative instruction. In fact, it gave such instructions to the jury, approximately, five or six times. I am aware of course, of various cases hold that curative instructions are insufficient for what's real stick about it. However, we have more than just the statement of the defendant, Benjamin Cruz. There was the testimony of Norberto Cruz, who is not a defendant in this action, but who testified to inculpatory statement made by the defendant Eulogio Cruz as well as the defendant Benjamin Cruz.

Cases do not require that the interlocking statements interlock in every element. It's pointed out in the Bursoff case (Phonetic), in both statements the defendants each put themselves at the scene of the [280] crime and indicated a common participation in the crime; and the Court in Sursoff's (Phonetic) case held that that was sufficient, even though there could be minor differences in the statements. So, it would appear here that there is four interlocking—There are interlocking confessions, but nonetheless, I previously have denied your motion, Mr. Blitz, for

a severence, conditionally, pending on certain further testimony.

I will again deny your motion for a severence conditionally pending further testimony in this case.

MR. BLITZ: Exception, your Honor.

THE COURT: The motion for a mistrial is denied. The motion for a severence is denied conditionally, as indicated.

* * * *

June 10, 1983

Proceedings.

* * * *

Colloquy

* * * *

[312] MR. BLITZ: * * *

At this time, I again renew my motion for a mistrial, your Honor, and a severance and/or a severance your Honor, based upon the arguments I've given before and ask the Court to rule on that at this time.

THE COURT: That motion is denied for the reasons set forth in the Court's ruling on a prior similar motion made yesterday or the day before.

MR. BLITZ: The other way, your Honor, said it was conditionally denied.

THE COURT: Yes.

MR. BLITZ: Is it still conditionally denied?

THE COURT: No, it's denied for all purposes. Unconditionally.

MR. BLITZ: Except, your Honor.

* * * *

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 62

Indictment # 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EULOGIO CRUZ, DEFENDANT

DECISION AND ORDER DATED JUNE 10, 1983, DENYING SEVERANCE

DECISION

EGGERT, J.:

The following constitutes the decision and order of the court on defendant Eulogio Cruz' motion for a mistrial and severance.

This case presents the question whether the "interlocking confessions" exception to the rule in *Bruton v. United States*, (391 US 123) applies when a co-defendant at a joint trial makes a confession to the authorities implicating the defendant and the defendant makes an "interlocking" admission to a private citizen acquaintance, rather than to the authorities.

Bruton (*supra*) holds that it is error to permit a defendant to be tried jointly with a co-defendant where the co-defendant has made a confession which will be introduced against him and which also implicates the defendant, (assuming the co-defendant does not testify). This is because the defendant has no way of cross-examining his co-defendant as to this damaging testimony, and it would be futile for the court to give instructions limiting the co-defendant's statements to the co-defendant himself.

Nevertheless, our Court of Appeals has long recognized an exception to *Bruton*, "where each of the defendants

has himself made a full voluntary confession which is almost identical to the confessions of his co-defendants" (*People v. McNeil*, 24 NY 2d 550, 552). This exception, which was approved by a plurality of the Supreme Court of the United States in *Parker v. Randolph*, (442 US 62), would permit receipt of the co-defendant's confession at a joint trial, with instructions that it is evidence against the co-defendant only.

The pertinent facts are as follows:

The two co-defendants, Benjamin and Eulogio Cruz, who are brothers, are charged with felony murder and robbery in connection with a gas station holdup in which Benjamin allegedly shot and killed the attendant while Eulogio actively participated in the holdup. The only evidence connecting Eulogio with the crime is the testimony of his acquaintance, Norberto Cruz (no relation) that shortly after the crime both Cruz brothers came to Norberto and boasted of their involvement in the holdup and admitted their full criminal liability. Many months later, after Norberto had had a falling-out with the Cruz brothers, he revealed these admissions to the police while the police were conducting another investigation. Norberto was not a suspect in this or any other crime at that time and there is no claim that he was offering these revelations in return for lenient treatment from the police. Eulogio made no statement to law enforcement authorities.

Benjamin made a statement to the police and then a more detailed statement on videotape to an Assistant District Attorney. In his statements he admits that he was the shooter and gives a detailed account of his brother Eulogio's participation in the crime. These statements by Benjamin are being received as evidence against Benjamin at the trial. Benjamin is not testifying at the trial.

The two statements interlock fully as to the details of the crime and as to the full liability of each defendant for the crimes charged. The significant difference between the statements is as follows: While there is no dispute

that Benjamin's videotaped statement was actually made, Norberto's account of his conversation with the Cruz brothers is being attacked as a fabrication.

Eulogio moved for a severance prior to trial and this Court denied the motion with leave to renew at the close of the trial evidence. At the end of trial evidence Eulogio moved for a mistrial and renewed his motion for a severance.

To determine whether the "interlocking confessions" exception applies to confessions made under the radically different circumstances present in this case, we turn to the oft-stated rationale for this exception: "The justification for this exception is that separate confessions, without being mirror images of each other, may yet be so duplicative in their description of the crucial facts that the one of the non-testifying co-defendant may be of no measurable consequence in the face of the overwhelming and largely uncontroverted evidence contained in the interlocking confession of the defendant himself (citations omitted)", (*People v. Berzups*, 49 NY2d 417, 425). Consequently, the exception only applies where the contents of the two confessions fully interlock as to the facts, or at least interlock to the extent that the defendant is unambiguously admitting criminal liability for the crime charged (*People v. Berzups, supra*, at 426).

For example, in *People v. Smalls* (55 NY 2d 407) the co-defendant made a confession in which he directly implicated the defendant as a knowing participant in the crime, while the defendant, on the other hand, made a confession which was ambiguous as to his knowing participation. The Court of Appeals held that it was error to jointly try the defendant and co-defendant and admit the co-defendant's confession because of the danger that the jury might have resolved the ambiguities in the defendant's confession by reference to the co-defendant's confession. Thus, the co-defendant's confession, which was not subject to cross-examination, would have added substantially to the case against the defendant (see also *People v. Burns*, 84 AD 2d 845).

It is clear that the interlocking confessions exception requires the confessions to interlock as to *content*. However, there does not appear to be any requirement in the case law that they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making, and the reliability of the evidence that the confessions were actually made (see *People v. Woodward*, 50 NY 2d 922).

In the instant case, defendant Eulogio Cruz argues that "interlocking" as to content is not enough. Here, Eulogio contends that he never made a confession to Norberto, and claims that Norberto made up the whole story out of malice and other unworthy motives. However, in view of the videotaping, it is undisputed that Benjamin did in fact make an interlocking confession implicating Eulogio. Therefore, defendant argues that the reasoning of *People v. Smalls* (*supra*) should apply with equal force, since there is a grave danger that a jury would resolve any doubts about whether Eulogio in fact confessed to Norberto by making reference to Benjamin's video confession.

While this argument may appear to have some merit it is the same argument unsuccessfully raised by the dissenters in the leading cases which established the interlocking confessions exception at the State and Federal levels. In *People v. McNeil*, (*supra* at pp. 555-556), Chief Judge Fuld pointed out in his dissent that if there is a question about the truth or voluntariness of a defendant's confession, a jury might improperly resolve that doubt by reference to a co-defendant's confession. In *Parker v. Randolph* (*supra* at pp. 84-85), Justice Stevens' dissent posed the hypothetical situation in which a co-defendant confesses on live television and implicates the defendant, while the defendant himself makes an "interlocking confession" which is vaguely recalled by a drinking partner, former cellmate, or a divorced spouse. Notwithstanding

these arguments, the highest courts of this State and Nation have recognized an interlocking confession which does *not* depend on the reliability of the defendant's own confession.

In *Tamilio v. Fogg*, 546 F. Supp. 372, the petitioner argued that under *Parker v. Randolph* (*supra*), the interlocking confessions exception does not apply if the defendant attacks his own alleged confession as a fabrication. The District Court (Neaher, J.) rejected that interpretation of *Parker* on the grounds that it would allow any defendant to avoid the interlocking confession rule by merely disclaiming his own confession. (The court did grant habeas corpus relief on the grounds that the confessions were not fully interlocking and because the fact that the petitioner's alleged confession was a highly suspect confession to a cellmate added to the prejudice caused by the improper receipt of the co-defendant's confession at the joint trial [See *People v. Santanella*, 63 AD 2d 744]).

As a final note, in this case defendant Eulogio Cruz' confession to Norberto is not so utterly unreliable as to render the use of the co-defendant's videotaped confession inherently prejudicial. While Norberto, not surprisingly, made no immediate outcry about his then-friend's startling revelations, his testimony could easily have been credited beyond a reasonable doubt by a jury, regardless of the videotaped confession by Benjamin, which itself was vigorously attacked at the trial by Benjamin, who contended that it had been coerced and staged by the police.

Accordingly, defendant Eulogio Cruz' motion for a mistrial and severance is denied.

Dated: June 10, 1983

/s/ FWE
FRED W. EGGERT
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 53

[Title Omitted in Printing]

DECISION DATED SEPTEMBER 26, 1983, DENYING SEVERANCE

CERBONE, J.

The following constitutes the decision of the court on the defendant Eulogio Cruz's motion for a severance.

The case was originally assigned for trial to Justice Fred W. Eggert of this court, before whom the defendant made the identical motion before trial which was denied with leave to renew at the close of the trial evidence. At the end of the case the defendant moved for a mistrial and renewed his motion for severance.

Justice Eggert, in a well reasoned decision consisting of seven pages dated June 10, 1983, denied defendant Eulogio Cruz's motion for a mistrial and severance.

The defendant Eulogio Cruz now renews his original application for a severance before this court. It is to be noted that Justice Eggert's written decision denying the defendant's motion for a severance was rendered at the end of the trial evidence, at a time when the court was in a position to hear and evaluate all of the testimony which may have been considered detrimental to the defendant.

The courts in New York have consistently upheld the doctrine of the "law of the case", which is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned. United States v United States Smelting Co., 339 US 186,198; Insurance Group v Denver and R.G.W.R. Co., 329 US 607,612; Messenger v Anderson, 225 US 436,444; Martin v City of Cohoes, 37 NY 2d 162; Civil Practice Law and Rules, Rule 2221

and the written commentaries thereunder; People v Mason, 97 Misc 2d 706.

Accordingly, the decision and order of Judge Eggert, dated June 10, 1983, is the "law of the case", and is adopted by this court.

The defendant's application to sever is in all respects denied.

Dated: September 26, 1983

/s/ Joseph A. Cerbone
JOSEPH A. CERBONE
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 53

Ind. Nos. 1793, 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

v.

BENJAMIN CRUZ & EULOGIO MEDINA CRUZ, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS,
SECOND TRIAL

Before: Hon. Joseph Cerbone

September 28, 1983

Proceedings

* * * *

TESTIMONY OF POLICE OFFICER PETER RONDA

* * * *

[62] POLICE OFFICER PETER RONDA, shield number 18055, having been called by and for the People, having been duly sworn, testified as follows:

THE COURT OFFICER: The witness gives his name as Police Officer Peter Ronda R-O-N-D-A, shield number 18055, assigned to the 45th precinct Anti-Crime Unit, New York City Police Department.

* * * *

[81] As far as you know was this defendant, Benjamin Cruz, when you spoke to him, under arrest?

A No, sir.

Q When you spoke to him, sir, did he mention about a homicide that occurred in what we would call the 40th precinct?

A Yes, sir.

Q Could you tell us what he said with relation to a shooting that happened in, only in the 40th precinct? Can you tell us?

A I shot a guy who shot my brother, Chino in a gas station on 149th.

* * * *

COLLOQUY

* * * *

[114] MR. BLITZ: Your Honor, Counsel for Benjamin Cruz stated a few minutes ago on the record that he does not intend to put his client on the stand. In view of that, your Honor, I would respectfully move since I will not have an opportunity to cross examine his client, to redact from the video tape any mention of my client.

THE COURT: Denied. Anything else?

MR. BLITZ: Exception, your Honor.

Before the playing of the video tape I would ask your Honor to instruct the jury as to that they can only consider the video tape in the case of People against Benjamin-Cruz.

THE COURT: All right, I will so instruct them.

* * * *

[119] THE COURT: Is there any question? Do you object to the tape going into evidence, is that correct?

MR. BLITZ: Yes, Judge.

THE COURT: Do you object to the redactions?

MR. BLITZ: To the redactions, no.

THE COURT: All right. Let's proceed now.

* * * *

[120] THE COURT: Good afternoon. You are about to view and hear a video tape wherein Mr. Benjamin Cruz is interrogated. I charge you and instruct you that any statements that are made by Mr. Benjamin Cruz are to be considered by you only as against Benjamin Cruz.

Is that clear?

All right.

[121] MR. BLITZ: Any mention of Eulogio Cruz is not to be considered.

THE COURT: I said is to be considered by you only as against Mr. Benjamin Cruz. Whatever he says and whatever you hear is not to be considered by you in any manner whatsoever as against Eulogio Cruz.

You may proceed.

MR. ROSENBLATT: At this time, your Honor, I'm asking Mr. John Simminetti who is the video technician from the Bronx District Attorney to respectfully play this tape in front of the jury.

(Whereupon, said video tape was played.)

THE COURT: You may call your next witness.

* * * *

TESTIMONY OF NORBERTO CRUZ

* * * *

[122] NORBERTO CRUZ, having been called as a witness by and on behalf of the People, through an interpreter, having been first sworn, testified as follows:

THE COURT OFFICER: Be seated.

The witness gives his name as N-O-R-B-E-R-T-O Cruz, resident of Bronx County.

DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * * *

[123] Q By the way, Mr. Cruz, do you know these two defendants?

A Yes.

Q How long do you know Benjamin Cruz?

A About fifteen years.

Q Is he related to you?

A No.

Q Do you know him?

A Only by friendship.

Q Do you know him by Benjamin or by a nickname?
A Benjamin.
Q Do you know the defendant, Eulogio Cruz?
A Yes.
Q Are you related to him?
A Friendship, like friendship.
Q How long have you known Eulogio Cruz?
A About twenty-five years.
Q Did you know him from this country or from Puerto Rico?
A Puerto Rico.
[124] Q I direct your attention to May 29, 1981. Where were you living at that time?
A 151st Street and Cortland.
THE COURT: Where was he living?
THE INTERPRETER: 151st Street and Cortland, 340.
Q Did you have occasion to see anybody on November 29, 1981?
A Yes.
Q Who did you see, sir?
A Eulogio Cruz and Benjamin.
Q Where did you see them, sir?
A In my house, my apartment.
Q Could you approximate a time that you saw them that day?
A About one hour.
Q Do you know what time they came to your apartment? Could you estimate the time?
A Around ten.
Q Would that be ten o'clock in the morning or ten o'clock in the evening?
A In the morning.
Q When they came to your apartment did you make any observations as to defendant, Eulogio Cruz?
[125] A Yes.
Q What if anything did you observe as to Eulogio Cruz?
A He was very nervous and he had a bandage around his hand.

Q Did you notice anything about the bandage around his hand?
A Yes, it had blood.
Q Do you recall which hand it was?
A The right.
Q Did he come with Benjamin or did he come alone, Eulogio?
A He came with Benjamin.
Q Did you have any conversation with Eulogio Cruz when you saw this bandage with blood?
A Yes, I asked him what had happend to him.
Q And do you recall what he said to you, sir?
THE COURT: Wait, I direct you any statement made by Eulogio is to be taken into consideration by you only as against Mr. Eulogio Cruz.
Take it from there.
MR. ROSENBLATT: Thank you, [126] your Honor.
Q What did Eulogio tell you?
A That they had gone to give a hold up to a gas station and that he started struggling with him.
THE COURT: Excuse me, speak up. Raise your voice.
A He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station.
Q Did he tell you why he went to the gasoline station?
MR. BLITZ: Objection.
THE COURT: Overruled.
A That he was going to give a hold up.
Q When Mr. Eulogio Cruz spoke to you at that time, where was Benjamin Cruz?
A Beside me.
Q Did you have a conversation with Benjamin Cruz?
MR. KATZ: Objection.
THE COURT: Overruled.
A Yes.

Q What did you say to Benjamin Cruz and [127] what did he say to you?

THE COURT: Wait. I now direct you, that any statement made by Mr. Benjamin Cruz is to be taken into consideration only as against Benjamin Cruz.

All right.

Q What did Benjamin Cruz tell you?

A That Eulogio had sent him to search the man, that he didn't, he hadn't done it well.

THE COURT: That he what?

THE WITNESS: That he hadn't done it well and then Benjamin, how do you say, Benjamin started arguing with Eulogio and then, that's when it happened, the thing of the gasoline station.

Q Did Benjamin Cruz tell you how Eulogio Cruz got hurt?

A No.

Q Did Benjamin Cruz tell you why they went to the gasoline station?

A No.

Q Did Benjamin Cruz tell you what he did at the gasoline station?

A Yes.

[128] Q What did he tell you that he did?

A That he saw the man bend over, take out the gun and fire. He fired at Chino and then he jumped up and fired at the man in the gasoline station.

Q Well, just for clarification, who fired at Chino? Did he tell you that?

A Yes, the man at the gasoline station.

Q How long did Benjamin and Eulogio stay at your house?

A About an hour.

Q Who else was present besides you, Benjamin and Eulogio in the apartment at that time?

A No one else.

Q Did there come a time that Eulogio left the apartment?

A Yes, at the hour.

Q Do you know, to your knowledge whether Eulogio had medical attention?

MR. BLITZ: Objection.

THE COURT: Yes, sustained.

Q Did you offer any help to Eulogio?

MR. BLITZ: Objection.

THE COURT: Overruled.

A Yes.

[129] Q What did you offer?

A I asked him if I could take him to the hospital.

Q What did Eulogio say, if you can take him to the hospital?

A He said it was very dangerous that he did not want to go to the hospital.

Q How long did Eulogio remain in the apartment?

A One hour.

Q How long did Benjamin reamin in the apartment?

A The same time, the hour.

Q Did they both leave together?

A Yes.

Q Did they leave alone or with anybody else?

A With my brother. Then he was sleeping.

Q What brother was that? What is his name?

A Geraldo Cruz.

Q Is that Jerry Cruz?

A Yes.

Q When is the next time you saw Benjamin Cruz?

[130] A The following day.

Q Where was this that you saw Benjamin Cruz?

A In my house.

Q He came to your apartment?

A Yes.

Q Did he come there alone?

A Yes.

Q Who else was in the apartment when Benjamin Cruz came to your apartment?

A No one else.

Q Did you have a conversation with Benjamin Cruz?
A Yes.
MR. KATZ: Objection.
THE COURT: Overruled.
Q What if anything did he say to you and what if anything did you say to him?
THE COURT: Excuse me—
MR. BLITZ: Instruction to the jury, your Honor, as to this conversation.
THE COURT: Yes. Any conversation between this witness now and Benjamin [131] Cruz will be considered by you only as against the defendant, Benjamin Cruz.
Q What if anything did he say to you and what did you say to him?
A He told me to clean the blood that was in the car because it was very dangerous for Jerry.
Q Do you know what car he was talking about?
A Yes.
Q Whose car was that?
A The car was mine and I had given it to him.
Q Given it to who?
A To Jerry, Geraldo.
Q When did you give your car to your brother, Jerry Cruz?
A About two months before, before what happened.
Q When is the last time you saw Benjamin Cruz?
A The last time that he came to my house to clean the blood off the car.
Q And that was the next day after they both came together?
A Yes.
Q That's the last time you saw Benjamin Cruz?
[132] A Yes.
Q When is the last time you saw Eulogio Cruz?
A Eulogio Cruz, I do not remember.

* * * *

Q By the way, have you ever been convicted of a crime?

A Driving without a license.
THE COURT: Driving without a license?
[133] THE WITNESS: Without a license.
Q When was that, sir?
A It's been about eight years.
Q Eight years ago?
A Yes.
Q Is that the only time you have been in trouble?
A The only time.
Q What did you do for a living?
A Mechanic. I work in mechanics.
Q Automobile mechanics?
A Yes.
MR. ROSENBLATT: No further questions, your Honor.
THE COURT: You may proceed.
MR. KATZ: Thank you, your Honor.

CROSS EXAMINATION

BY MR. KATZ:

Q Mr. Cruz, how old are you?
A Thirty-two. Thirty-two going on thirty-three.
Q You say that you were friendlier with Chino than you were with Benjamin, is that correct?
A Yes.
Q Chino is closer to your age, is that correct?
[134] A Yes.
Q How old would your brother be now if he was alive?
A Thirty-one, around there.
THE COURT: Keep your voice up, please. Keep your voice up.
Q So, that the three of you were contemporaries, around the same age, you Chino and Geraldo?
A Yes.
Q You have known this Cruz family, Mr. Chino and Benjamin Cruz family for a long time?

A Yes.

* * * *

[136] Q I believe you stated you worked as an auto mechanic, is that correct?

A Yes.

Q Who do you work for?

A For myself.

Q Do you have a shop somewhere?

A Had.

Q When is the last time you had your shop?

A About ten years.

Q Ten years ago is the last time you had your shop?

A Yes.

Q From ten years ago till now did you use any other person's shop?

THE COURT: I can't hear you, sir. Will you keep your voice up?

Q You said you have not had your shop for ten years, is that correct?

A Yes.

Q And you have worked as a mechanic for [137] these past ten years?

A Yes.

Q Have you ever had any other source of income?

A No.

Q Mr. Cruz, you stated you received no other source of income other than as an auto mechanic, is that correct?

A Repeat it again.

MR. KATZ: Read it back.

(Whereupon, requested testimony was read back.)

A Yes.

Q Now, Mr. Cruz, I'm going to ask you if you recall testifying at a previous proceeding, yes or no?

A Yes.

Q And do you recall this gentleman seated right here, Mr. Blitz, do you recall this particular gentleman?

A Yes.

Q Do you recall he asked you certain questions?

A Yes.

[138] Q Do you recall Mr. Blitz asking this question: "QUESTION: Are you in good health? ANSWER: Yes."

Do you recall Mr. Blitz asking you that question and you giving that answer?

A Yes

Q You also recall Mr. Blitz asking you this question: "QUESTION: When was the last time you worked? ANSWER: It was about two years."

Do you recall giving that answer?

A Yes.

Q You also recall Mr. Blitz asking you this question: "QUESTION: And how long have you been on welfare? ANSWER: More or less that same date, two years since I was suspended from work."

Do you recall being asked those questions by Mr. Blitz and giving those answers?

A Yes.

* * * *

[139] Q Besides having your own shop you said you have not had it for approximately ten years and you said that you also worked as an auto mechanic since then, is that correct?

A Yes.

Q Where?

A In the street.

Q Do you work for any other place?

A No.

Q You stated that at about ten a.m. on November 29, 1981, Benjamin and Eulogio came to your house?

A Yes.

Q Where is your house?

A 340 151st Street.

Q Is it near where Eulogio lives?

A No.

[140] Q Is it near where Benjamin lives?

A No.

Q Where you live, is it a private house or an apartment building?

A Apartment.
Q And how big is your apartment?
A Four rooms.
Q Who lives in that apartment with you besides yourself?
A My wife, my children and Geraldo lived with me.

• • • •

[142] Q And Jerry stayed in the living room, is that correct?
A Yes.
Q When you enter your apartment what room do you enter into?
A I pass through the living room.
Q Mr. Cruz, I believe you stated that at ten o'clock on November 29, 1981, your brother was home asleep, is that correct?
A Yes.
Q In the living room?
A In the living room.
Q And that's the room that Benjamin and Eulogio entered into, is that correct?
A Yes.
Q You stated that two months prior to November 29th you had given your brother, Jerry, the car, is that correct?
A Yes.
Q What kind of car was it?
A Ford, Falcon '68.
Q How long had your brother been living with you up until that time, talking about up until November 29?
[143] A About four months.
Q During those four months that he lived with you was he working?
A I do not know.
Q Did he ever tell you what he did for a living during those four months he stated with you?
A No.

Q Did he contribute to the upkeep of the household?
A Yes, he would help me.
Q He would give you money?
A Sometimes.
Q You never asked him how he got that money, is that correct?
A MR. ROSENBLATT: Objection, your Honor.
THE COURT: Overruled.
A No.
Q Now, about how much time again, referring to ten a.m., November 29, 1981, did my client, Benjamin Cruz, stay in your apartment?
A He never stayed in the apartment.
Q Well, he came into your apartment, did he not?
[144] A Yes, for one hour.
Q So, he stayed from approximately ten a.m. until eleven a.m., is that correct?
A Until eleven o'clock in the morning.
Q What did he do during the course of that hour that he stayed at your apartment?
A He was waiting that Jerry would get dressed up to go.
Q And did Jerry get dressed up and go?
A He got dressed up and he went.
Q With Benjamin and Eulogio?
A Yes.
Q Did you go with them also?
A No.
Q And then you did not see Benjamin again until the next day, is that correct?
A Yes.
Q That would be on November 30th?
A November 30th.
Q And, I believe you stated it was sometime around four p.m., is that correct?
A Yes.
Q Was he alone or was he with anyone?
A Benjamin was alone.

• • • •

[145] Q Did there come a time, Mr. Cruz, when you told somebody about what Benjamin had told you on November 29th and November 30th? I asked him did there come a time.

A Yes.

Q And when was that?

A I don't remember well.

Q Perhaps I can refresh your recollection. Would April 27, 1982 help refresh your recollection?

A I don't remember.

Q Do you recall, I believe you already stated, that your brother died, is that correct?

A Yes.

[146] Q Do you know when your brother died?

A May 14, around there.

Q May or March?

A March, March.

THE COURT: March 14, 1982?

THE WITNESS: Yes.

Q And, did there come a time when you spoke to a police officer, a detective, in fact, concerning the death of your brother?

A Yes.

Q Was it shortly after your brother's death?

A Not too short.

Q Was it a day, a week, a month after your brother died you spoke to—

A About two weeks, more or less.

* * * *

[148] Q Mr. Cruz, isn't it a fact that a few days after the death of your brother a Detective Wood came to your house?

A Yes.

Q And he discussed your brother's death with you?

A Yes.

Q Isn't it a fact, Mr. Cruz, that up until that time you made mention to no one of what Benjamin told you on November 29, 1981?

A Yes.

Q Isn't it a fact, Mr. Cruz, that you told Detective Wood about the conversations with Benjamin on November 29, 1981?

A Yes.

Q On April 27, 1981?

THE COURT: You understand the question?

THE WITNESS: Yes.

THE COURT: What is the answer, yes or no?

[149] THE WITNESS: Tell it to me again.

THE COURT: I suggest you qualify and simplify.

MR. KATZ: Let me try to rephrase it.

Q The statement concerning the robbery of the gas station that was told to you by Benjamin on November 29, 1981?

A Yes.

Q Now, isn't it a fact that you did not tell anyone about that statement until you told Detective Wood on April 27, 1982?

A Yes.

Q And that was some six months after the incident occurred?

A Yes.

MR. KATZ: No further question.

CROSS EXAMINATION

BY MR. BLITZ:

Q Mr. Norberto, which arm did you say Eulogio Cruz had a bandage on?

A The right.

Q Can you show us which hand?

[150] A Yes.

(Witness indicates.)

Q What part of the hand?

THE COURT: Excuse me, was it on the hand or was it on the arm?

THE WITNESS: In the arm.

MR. BLITZ: Pointing to the forearm, Judge.
THE COURT: Yes. Let the record so indicate.
MR. BLITZ: The inner aspect of the arm.
Q Mr. Norberto, you swore to tell the truth. Do you remember that?
A Yes.
Q Are you telling us the truth?
MR. ROSENBLATT: Objection, your Honor.
A Yes.
THE COURT: Overruled.
Q How do you know it was November 29th that they came to your home?
A How was that?
Q You said that they came to your house [151] on November 29th, is that correct?
A Yes.
Q You didn't tell anybody about it until sometime in April, is that correct?
A Yes.
Q Did you make any record of the date that they came to your house?
A No.
Q How do you know it was November 29th?
A There was a small party in my house.
Q When was there a small party in your house?
A They were celebrating, how do you say, my wife was at the hospital. She was coming out of the hospital and we were celebrating that she was coming out of the hospital.
Q When were you celebrating?
A The day before, the 28th.

* * * *

[152] Q When, before November 29, 1981 did you see Mr. Eulogio Cruz?
A The 29th.
Q You saw him on the 29th?
A The 29th.
Q When before the 29th did you see him last?
A I hadn't seen him.

Q For how long hadn't you seen him?
A Had been about two months.
Q Where had you seen him before?
A In my house, my brother had brought him over.
Q Why didn't you tell anybody on November 29th, November 30th or December 1st about the shooting on Southern Boulevard?
A Because my brother had the event. My brother had the event.
Q Well, did your brother have anything to do with that event?
MR. ROSENBLATT: I'll object to [153] it.
THE COURT: Overruled.
MR. ROSENBLATT: Which event, just for the record?
THE COURT: Can you clarify? I'll permit the question. I think the DA's objecting to the use of the word event.
MR. ROSENBLATT: I have no objection as to the substance.
MR. BLITZ: I withdraw that question. I'll put another question.
Q Did your brother tell you what happened on November 29th at a gas station on 149th Street?
MR. ROSENBLATT: Objection, your Honor.
THE COURT: Overruled.
A No, he never told me anything of what had happened.
Q And you never spoke to your brother about what had happened on November 29, is that right?
A What Eulogio had said.
Q About what happened?
A No, I had never talked to him about nothing [154] about that.
Q Were you there on 149th Street and Southern Boulevard?
A No.

* * * *

[155] Q You said Mr. Eulogio told you something on November 29th, is that right?

A Yes.

Q Did you tell anybody about it on January, 1982?

A No.

Q In February, 1982?

A I don't remember.

Q You don't remember if you told anybody?

A I don't remember. I don't remember.

Q What do you remember is the first time you told the police anything about what you have told us here today?

MR. ROSENBLATT: Objection to the form of the question, Judge.

THE COURT: I'll permit it. [156] First, do you understand the question?

THE WITNESS: No.

THE COURT: I'll sustain the objection.

MR. ROSENBLATT: I don't understand it.

Q When is the first time you told the police that Eulogio said something to you?

A That was in March 14th when Eulogio tried to take me to the place where they had killed my brother.

Q You don't like Eulogio, do you?

A Why not?

THE COURT: I can't hear you. Do you like Eulogio, yes or no?

THE WITNESS: Yes.

Q You have been his friend for twenty-five years, is that right?

A Yes.

* * * *

[157] THE COURT: You said that Eulogio told you something?

THE WITNESS: Yes.

[158] THE COURT: On the morning of November 29th, is that right?

THE WITNESS: Yes.

THE COURT: And, there came a time when you told the police what he told you?

THE WITNESS: Yes.

THE COURT: When was that?

THE WITNESS: I don't remember the day or the date.

THE COURT: Was it after your brother passed away?

THE WITNESS: Yes.

THE COURT: Take it from there.

Q Was it after Eulogio took you to the place where your brother died?

THE COURT: Yes or no?

A Yes.

Q Tha's when you went to the police, am I right?

A Yes.

MR. ROSENBLATT: Objection.

That's when he—

THE COURT: Overruled.

[159] Q Is that when you went to the police?

A Yes.

MR. BLITZ: No further questions.

* * * *

RE-DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * * *

[160] Q When you spoke to the police did you speak to the police with reference to your brother's death, just answer yes or no?

THE COURT: Did you ever have a conversation with the police regarding the death of your brother, yes or no?

A Yes.

Q Was it then that you mentioned to the police as to what happened on November 29, 1981 at your apartment?

A Yes.

* * * * *

RE-CROSS EXAMINATION

BY MR. BLITZ:

* * * *

[162] THE COURT: There came a time when you told the police about what Mr. Eulogio told you on November 29th? Is that correct?

THE WITNESS: Yes.

THE COURT: Now, when you told the police about that was it something that you volunteered to them or was it something they asked of you?

THE WITNESS: No.

THE COURT: No? Was this [163] something you volunteered to them?

THE WITNESS: Yes.

THE COURT: All right.

Q And that you volunteered this because you are a good citizen?

THE COURT: Overruled.

MR. ROSENBLATT: I will withdraw the objection.

Q And you volunteered this because you were a good citizen, is that right?

A Yes.

MR. BLITZ: Thank you.

THE COURT: I will give you a chance.

RE-CROSS EXAMINATION

BY MR. KATZ:

Q Mr. Cruz, prior to your volunteering this information concerning the event of November 29th you had several conversations with the detective, is that correct?

THE COURT: Excuse me?

MR. ROSENBLATT: Which detective?

THE COURT: May we have the [164] time on this, please?

MR. ROSENBLATT: Thank you.

Q After you were informed of the death of your brother?

A Yes.

Q So, you had already spoken to Detective Wood?

A Yes.

Q On several occasions?

A Yes.

Q Prior to your telling him about what Benjamin told you on November 29th?

A Yes.

Q I believe you also testified, Mr. Cruz, that excluding Court proceedings the last time you saw Benjamin was on November 30th, is that correct?

A Yes.

Q You did not see him any other time other than in Court?

A Yes.

MR. KATZ: No further questions.

THE COURT: You may inquire.

[165] RE-DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * * *

Q When was the first time you met Detective Wood?

A On the date, 15th when he came to tell me [166] about the death of my—

THE COURT: Stop. Why don't you put the question was the first time you spoke to Detective Wood the time when you were advised about your brother's death?

THE WITNESS: Yes.

THE COURT: All right.

Q He came to your house to speak to you?

A Yes.

* * * *

Q When the detective came to your house that was with reference to Jerry, am I correct?

A Yes.

[167] Q Was it then that you spoke, that you told him as to what Benjamin and Eulogio Cruz told you on November 29th or was it on a subsequent date?

A I don't remember.

MR. ROSENBLATT: Thank you.

* * * *

RE-CROSS EXAMINATION

BY MR. BLITZ:

[168] Q Mr. Norberto, remember you told us before that Benjamin and Eulogio came to your apartment in the morning of November 29th?

A Yes.

Q And you said that Benjamin said something, Eulogio said something to you, is that correct?

A Yes.

Q Do you remember testifying in this Court, back in this courtroom, in this building about two months ago, do you remember?

A Yes.

* * * *

Q Do you remember being asked this question and making this answer: "QUESTION: When you say they explained to you if you can recall who said what to you and what if anything did you reply."

* * * *

[169] Q Do you remember being asked that question?

[170] A Yes.

Q Do you remember making this answer: "ANSWER: I asked Chino what had happened and Benjamin spoke."

Do you remember being asked that question, and making that answer?

A Yes.

Q Isn't it a fact Chino never said a word to you?

* * * *

THE COURT: Excuse me, who is Chino?

THE WITNESS: Eulogio.

Q Isn't it a fact Chino never said anything to you at any time?

A Repeat it again.

Q Isn't it a fact that Chino never said [171] anything to you at any time?

A I know that he talked to me.

Q Isn't it a fact he wasn't even in your house on November 29th?

A He was in my house.

* * * *

[172] RE-DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * * *

The question that was asked by, I believe Mr. Katz on cross-examination: "When you say they explained to you if you can recall who said what to you and what if anything did you reply, ANSWER: I asked Chino what had happened. Benjamin spoke."

Stopping at that point, did Benjamin speak at the same time Chino spoke?

[173] MR. BLITZ: Objection, your Honor.

THE COURT: Overruled.

MR. BLITZ: He is asking a question.

THE COURT: Overruled.

A Yes.

* * * *

[176] Q Did Eulogio Cruz tell you on November 29, 1981 as to what happened during the robbery of the gasoline station?

THE COURT: Yes or no?

A Yes.

* * * *

October 3, 1983
851 Grand Concourse
Bronx, New York

TESTIMONY OF DOCTOR JOHN PEARL

* * * *

[221] DR. JOHN PEARL, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

THE COURT OFFICER: The witness gives his name as Dr. John P-E-A-R-L. The doctor is an Associate Medical Examiner located in New York County.

DIRECT EXAMINATION BY

MR. ROSENBLATT:

* * * *

[224] Q Could you please tell us something about your external findings before you did the autopsy?

A He was a swathy-skin man, about five feet four inches tall. He weighed about one hundred sixty-five pounds and he had most significantly two kinds of injuries on his body. He had gun—two gunshot wounds and he also had what are called blunt force injuries. The blunt force injuries are due to something like a blow or a fall, in other words to distinguish them from say, cutting time injuries or penetrating injuries like a bullet wound. In this case he had a laceration or tear in the skin at the bridge of his nose. He had bruises around both eyes, black eyes and he had an abrasion of his right cheek, a scrape mark on his right cheek. He also had a scrape mark on his left shoulder.

Q And these were your external findings, am I correct?

[225] A Part of them, yes. Those are the external blunt force injuries. He also had two gunshot wounds. I don't know what order, I can't tell from the autopsy what order the shots were fired and so I'm discussing them in arbitrary order.

One bullet wound was above the right ear, where the ear joins the scalp and around this wound was black powder, gun powder with a half inch radius. This bullet didn't go inside the skull it actually broke into two parts and the pieces exited, half and one inch behind the entrance wound.

The second bullet wound though is in the left side of the head towards the front. This wound went into the brain, went through the scalp through the skull and across the brain from the left side to the right side where I recovered a deformed lead bullet and the tract of that wound was backward, downward and toward the right. The first wound went backward, downward and also slightly towards the right.

* * * *

TESTIMONY OF DETECTIVE STEPHEN COLANGELO

* * * *

[232] DETECTIVE COLANGELO, shield number 3074, New York City Police Department, Ballistics Squad, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

THE COURT OFFICER: The witness gives his name as Detective Stephen Colangelo, C-O-L-A-N-G-E-L-O, shield number 3074, assigned to Ballistics Squad, New York City Police Department.

DIRECT EXAMINATION BY

MR. ROSENBLATT:

* * *

[235] Q Now, Detective, assuming that during the autopsy as testified by Dr. Pearl that surrounding one of the wounds there was a black powder ring surrounding one of the holes approximately half inch in diameter, the fact there was a black ring, powder ring surround the wound. What does that mean to you as an expert?

[236] A Well, I'd say the muzzle of the gun was quite close to the target, to the wound.

THE COURT: When you say "quite close," that could mean various things to various people but we all understand inches, feet and yards. When you say "quite close", can you translate that into inches, feet, yards or whatever?

THE WITNESS: Yes. I'd say somewhere, three to six inches from the target.

Q Between three and six inches?

A The muzzle of the gun.

Q At the time it was fired?

A Right.

* * * *

October 4, 1983
851 Grand Concourse
New York, New York

SUMMATION ON BEHALF OF EULOGIO CRUZ

* * * *

BY MR. BLITZ:

* * * *

[318] Now, you, ladies and gentlemen, have a serious sophisticated problem and you recall that when you were selected for this jury you were asked could you separate the evidence as to Benjamin Cruz and as to Eulogio Cruz and you all said you could do that and now you are going to be called upon to do that.

His Honor will instruct you that anything that Mr. Ronda said, anything that Benjamin Cruz said, anything that Detective Wood said, that even referred to my client, you cannot consider. What does that mean? It means you are trying this murder case on sole evidence of Norberto Cruz as if you never tried Benjamin Cruz and only Eulogio Cruz will be tried when you deliberate.

[319] I'm not telling you how to do it or in what order to do it but just this is the way it has to be done.

His Honor will tell you that. You must consider as if you were trying the case of Eulogio Cruz for murder and what evidence have the People produced to prove him guilty beyond a reasonable doubt and if you recall the only testimony that connects my client with this crime is the brief words of Norberto Cruz when he said my client came into his apartment on November 29th.

Now, you heard and I don't want to go into it again, when Mr. Norberto Cruz' feelings were toward my client when they took him and these were his words: where they killed Jerry Cruz, my brother. You must consider that and you have a right to consider that testimony in determining whether or not he had a motive to lie.

Now, you cannot consider the death of Jerry Cruz against my client. That's another matter which will be determined at another time. You cannot consider that at all. You [320] are only concerned with the one crime. That's why I say this is a sophisticated process and you must reason it out and if someone says well, this was said about Eulogio Cruz or this was said about Eulogio Cruz, one of you or more of you must assert yourselves and say just a minute, your Honor said we cannot consider that.

Now, then, what is the question that remains in your mind? The question is is Norberto Cruz telling us the truth. Did Mr. Eulogio Cruz come to his apartment on November 29th with his hand bandaged, his right hand bandaged? Is there any evidence bearing in mind what you cannot consider and only what you can consider and you have a right in determining this case to consider the lack of evidence. His Honor will tell you that you can't guess or speculate, you must go by the evidence or lack of evidence. Is there any evidence that my client ever had an injury to his arm in this case? Have the People produced any medical evidence that Mr. Eulogio Cruz has an injury to his right arm or his left arm? [321] Is there any proof of that? There isn't any.

* * * *

PROSECUTOR'S SUMMATION

* * * *

BY MR. ROSENBLATT:

* * * *

[330] Now, you see, this is the bottom line. They can't get away from this. On May 3, that is the time that they arrested Benjamin Cruz and that's the time they get the video statement, practically in substance as to what Norberto Cruz told the police several days ago.

Now, you heard this particular video by this young man that they are going to fix up the place and that there was a scuffle between the deceased. He didn't—he is working for a living, five o'clock in the morning. It isn't his money to give. Maybe he made the wrong choice, to fight for the money and he was [331] shot and killed. Can't get away from that. That's the bottom line because when Norberto Cruz told the police as to what Eulogio Cruz told them and Benjamin Cruz told them is substantiated afterward by Benjamin Cruz himself. That is the bottom line, they can't get away from it. Stop and think what I have said. The fact that Benjamin Cruz made that statement substantiates as to what Norberto Cruz is telling you. They are attacking him, of course he is a poor fellow. What else are they going to do? What else are they going to do? It is his brother. Have us believe but it is for you to decide where the proof lies. You have to be the judges as to the facts. You have to decide whether or not Benjamin Cruz and Eulogio Cruz went to this gasoline station on the morning of November 29, 1981 for the sole purpose of sticking it up and during the commission of that particular crime they killed that attendant. That is the evidence that you can't get away. The fact that he said it, Benjamin, the fact that both of them told Norberto Cruz because Benjamin in his statement [332] corroborates as to what they told him. This is afterward, can't get away from it. That's it regardless of how many little twists you throw in, give you certain innuendoes. Those are the facts.

What purpose, what motive does Wood have, Ronda have, Cirincione have, Zuba have, Fitzpatrick have, Coangelo have? What motive do they have to come in and tell you what they observed, what they observed? I respectfully submit that on that day when these two defendants maybe when Jerry Cruz, came to rob that station and as a result of that robbery some man is dead and that the people have proven not only by the statements of this young man, this defendant but also what they told another person.

Another thing, if Norberto Cruz was making this up, how would be know if he didn't see Norberto since November 29th, how would he know that he was shot in the arm because Benjamin Cruz, in his statement afterward on May 3rd tells you on his video that his brother was shot in the arm. Think it over now. Could [333] he be fabricating now, Norberto Cruz? I submit to you he told you the truth. He told you the way it is. The fact that he didn't come forward because maybe, in his heart, he knew his brother, Jerry Cruz, was involved. It is clear cut. If you accept what the defense will have you believe then you are going to believe that hair is growing from the palm of my hand. You have got the facts. You have got the evidence. You have heard the testimony and there is only one verdict and one verdict alone, that on this day these two defendants acting in concert with others were committing a robbery and there can only be one verdict and that is guilty.

Thank you.

* * * *

COURT'S CHARGE

* * * *

[344] In other words the fact that these defendants were not called as witnesses are not facts which are to be considered by you in arriving at your verdict. You must keep in mind, members of the jury, that each, though there are two defendants being tried together, in fact, you are trying two separate cases at the same time. You are called upon to [345] consider the case of each defendant separately because you are required to render a separate verdict as to each defendant. If you are satisfied beyond a reasonable doubt as to the guilt of one defendant and you entertain a reasonable doubt as to the guilt of the other defendant you may find the defendant as to whose guilt you have no reasonable doubt guilty and the other defendant, and as far as the other defendant is concerned, as to his guilt you do not entertain a reasonable doubt, not guilty.

During the course of the trial there has been testimony to the effect that both defendants, Benjamin Cruz and Eulogio Cruz made statements at different times to different people. You are hereby charged that the statements allegedly made by each defendant are to be considered solely as to the person who allegedly made those statements.

Therefore, I charge you that those statements allegedly made by the defendant, Benjamin Cruz, to Norberto Cruz who is not related to either of the defendants, statement made to [346] Detective Wood and the Assistant District Attorney which you heard and viewed on Video tape are to be considered solely against the defendant, Benjamin Cruz and have no bearing upon the guilt or innocence of Eulogio Cruz.

Similarly, those statements allegedly made by the defendant, Eulogio Cruz to Norberto is to be considered solely as against the defendant, Eulogio Cruz and have no bearing upon the guilt or innocence of Benjamin Cruz.

* * * *

JURY DELIBERATIONS

* * * *

[376] THE COURT: Mr. Foreman, I have a note that reads as follows: We, the jury request the following: one, video replay with interpreter.

Second, entire testimony of Norberto Cruz.

Did you send that note?

THE FOREMAN: Yes, sir.

THE COURT: It is dated October 4, 1983, 1:56 p.m.,

[377] THE FOREMAN: William C. Saunders.

THE COURT: Would you have it marked Court's exhibit five?

(Whereupon, said note was marked as Court exhibit five.)

THE COURT: Please play the video.

(Whereupon, said video tape was played.)

THE COURT: This is the statement: I advise you now this should be considered by you only as against Mr. Benjamin Cruz. You all understand that? All right.

(Whereupon, video tape is over.)

THE COURT: Will you now please read the testimony of Norberto Cruz, both direct and cross examination.

(Whereupon, the reporter read the requested testimony.)

* * * *

TRANSCRIPT OF VIDEOTAPED CONFESSION

[1]

DATE: May 3rd, 1982

PLACE: 45th Precinct

A.D.A.: Karen

STATEMENT OF: BENJAMIN CRUZ

BY MR. KAREN

Q This is Assistant District Attorney Allen Karen. It is now 11:27 p.m. in the morning, May 3rd, 1982 and I'm at the 45th Precinct. I'm here with videotape technician, John Simonetti, the D.A. Stenographer Whitter, D.A. Interpreter George Santiago, Detective Tinelli, Shield #2553 of the 40th Precint, Detective George Wood, Shield #2408 of the 45th Precinct P.D.U. and Detective Henry Roje, Shield #3718 of the 45th Precinct.

I'm also here with a suspect I'm informed his name is Benjamin Cruz, is that your name, sir?

You have to say and answer out loud?

Q Yes.

[2bw] Q Mr. Cruz, this gentleman with the video camera, is making a movie of what is going on, he is focusing on you and that clock, do you understand?

A Yes.

Q Everthing we are doing is recorded, if anything were cut out there would be a gap in time on the clock, do you understand?

A Yes.

Q This lady is typing down everything we are saying she is the stenographer, do you understand?

A Yes.

Q I'm Assistant District Attorney, I'm not your lawyer I'm here to investigate a murder, should you be charged I would be the person who would try to prove

based on the evidence that you were guilty, do you understand what I do?

A No.

Q You don't understand what I do?

A I don't understand.

Q Let me explain again. I'm not your lawyer.

A Well, your job is like a lawyer, but ah—

Q Let me explain. I'm not your lawyer, I work with the police I try to prove based on the evidence that the defendants are guilty, you understand what I do?

A Yes.

Q I was called here because I'm told that you made [3bw] a statement to the police officer about your having been involved in a shooting and killing of a gas station attendant, at 149th Street and Southern Boulevard on November of 1981.

I am informed you made a statement that you shot the attendant in the head with a 357 magnum and that you killed and further that that attendant had shot your brother, Chino in the arm?

A Yes.

Q Now I'm going to give you your rights, I want you to listen carefully, if you don't understand anything let us know.

You have the right to remain silent and to refuse to answer questions, do you understand?

A Yes.

Q Anything you say maybe used against you in a court of law, do you understand?

A Yes.

Q You have the right to speak to a lawyer before speaking to the police or me and to have a lawyer present during any questioning now or in the future, do you understand?

A Yes.

Q If you can't afford a lawyer, one will be given to you for free, do you understand?

A Yes.

[4bw] Q If you don't have a lawyer available, you have the right to remain silent until you have had a chance to speak to to one, do you understand?

A Yes.

Q Now that I have given you your rights, have you understood what I have said?

A Yes.

Q Are you willing to tell us what you know about this killing of the gas station attendant in November of 1981?

A You mean tell the day of the robbery?

Q Yes, what happened?

A You know my brother and myself you know, we was there and my friend you know he was drunk you know he invited me to rob the gas station. Yes, he invited me you know, then later on yes we told the man in the gas station to put only one gallon of gasoline and then right there I took out the gun, I told him this is a hold up, I told him this is a hold-up you know, when I told him that this was a hold-up, so then we went inside you know and after we put him inside and then we asked him for the money you know, we asked him for the money and he said this is not to give away you know, this is not my money to give away and then Chino told him, then Chineo said look if you don't give any money, you're going to have difficulty, I'm going to kill you, then Chino [5bw] told him give me all your money and then Chineo hit him with the gun on top of the nose and both of them started fighting and then I went right away to the door and then I asked the guy to open the door, he said I cannot open the door and they continued fighting and they continued fighting and then the man came and they fired one shot and he hit Chino in the arm and then Chino came and he hit him with the gun you know and after he hit him with the gun, I told Chino to open the door and then Chino threw the gun to the door and then after he threw the gun, I told Chino to open the door, but he could not open the door and then the guy picked

up the gunlike to hit Chino in the head, I opened the door and then I said to Chino look out and then I went like this with the gun and I shot him in the head and I killed him.

Q How many guns were involved, how many guns did you, Chino and the third guy have?

A Three (3) guns.

Q Were they all loaded?

A Yes.

Q Whose guns were they?

A From previous hold-ups that we had done in the streets, in stores and all that.

Q How many hold-ups have you done in store, hold-ups?

A About six of them.

Q What kind of gun did you have?

[6bw] A I had a magnum.

Q Where did you get it?

A In the store, I took it away from the guy you know you see he had a knife at that time and thats, then when he took out the weapon and me with the knife, I tried to stop him and I took the gun away from him.

Q Now, this magnum is the gun you used to kill the attendant, right?

A Yes.

Q Where did you shoot the attendant?

A Right here.

Q Right between the eyes?

A Yes.

Q How far were you standing from the attendant when you shot him between the eyes?

A About standing right there and I went pow you know over the arm of my brother, my brother was in front I went over my brother like this, over the shoulder and I shot him.

Q So you were very close with the gun?

A Yes.

Q Did you aim before you shot?

A Yes, I pointed like that.

Q Right between the eyes?

A I pointed right there and pow and I fired.

Q What happened when you shot the gun, what did [7bw] he do?

Q The guy fell backwards and then after we took the money we started running.

Q How much money did you get?

A About $62.00.

Q What did you do with it?

A We spent it.

Q How many guys were with you, two guys?

A Three.

Q A total of four guys?

A It was four (4).

Q Who are they?

A One was the driver and the other three who was inside the gas station.

Q Did the driver ever enter the gas station?

A He stood in the car.

Q What is his name?

A Jerry.

Q What is his last name?

A Cruz.

Q Where is he now?

A Dead.

Q Do you know how he died?

A They killed him.

Q Are you related to this person this Jerry Cruz?

A No.

[8bw] Q Do you know who killed him?

A No.

Q Now, who went into the gas station with you?

A Chino.

Q Whose that?

A My brother.

Q What is his real name?

A Eusibio Cruz Medina.

Q Where is he now?
A Where he is I don't know.
Q Where does he live?
A I don't know.
Q When did you last see him?
A Let me see, thursday.
Q Where does he hang out?
A Where he hangs out I don't know.
Q Who were the other two guys?
A The other two guys that was with us, one is by the name of Pacho, he is back in the Island.
Q And how about the other guy?
A It was me, Chino, Pacho and the deceased.
Q Did you mention something about someone named Caino?
A No.
Q Now, what kind of gun does Chino have?
[9bw] A .38 long.
Q How about the the guy back in the Island?
A He had a .38 short.
Q Now, ever since you took this magnum from this store keeper with the knife, have you kept it with you, have you kept it in your apartment?
A No, not with me I gave it to Chino to put away.
Q What did you do with the murder weapon after you shot the attendant?
A Well, I started running what did I do with the weapon, I sold it.
Q Who did you sell it to?
A The guy over there. I don't know his name he said he needed a gun and I sold the gun to him for $250.00.
Q $250.00, by the way, where do you live?
A 534-307 I live on 138th Street and Brook Avenue.
Q Who do you live with?
A My mother.
Q Anybody else?
A Yes, my sister, my mother and my other—

Q What is your brother's name?
A David Cruz.
Q And the other one?
A See my mother lives here, but they live in some place, the one who lives with my mother is the small one, Domingo Cruz and the other one is Neida Cruz.
[10bw] Q How old are you?
A Twenty-two.
Q What is your date of birth?
A October 26th, 1959.
Q Do you go to school or work?
A No.
Q Have you ever pleaded guilty or been convicted of any crime?
A No.
Q Now, when you went into the gas station, who announced the robbery?
A Chino.
Q Did he speak in English or in Spanish?
A Who Chino?
Q Yes.
A In Spanish.
Q And the attendant was he speaking in English or in Spanish?
A He was Spanish, Puerto Rican.
Q Now you mentioned at one point he had a gun, was it his own gun?
A It was his gun, a .22
Q Now, you mentioned that you shot this attendant between the eyes killing him; did he also fire a shot?
A Yes, he fired one shot he shot Chino over here
[11bw] Q In which arm?
A This one.
Q In the left arm?
A Yes, the left.
Q Now, did Chino go anywhere for treatment of that arm?
A No.

Q How do you know?
A We bandaged him and we took care of him.
Q How do you know it was a .22?
A It was a small one.
Q What happened to that gun?
A We took it and we threw it away.
Q Were there any other shots fired?
A Chino shot at him, he shot he shot him like to burn the clothes very close.
Q Now, today you went to the precinct to look for a detective to speak to him, right?
A Yes, look for these people but I couldn't find him.
Q And they were asking you about who killed Jerry Cruz, right?
A Yes, they were looking for who killed Jerry Cruz, but I did not kill him.
Q And thats when you told them that you had killed [12bw] this attendant on 149th and Southern Boulevard, right?
A Yes.
Q Now, when you spoke to the police, was there any interpreter there?
A Yes.
Q Did you understand what he said?
A The guy who spoke English?
Q The guy who spoke Spanish?
A Yes.
Q You understood him?
A Yes.
Q How have the police treated you so far?
A Like that.
Q No complaints?
A No.
Q And you told them you told the police about killing this attendant just like you told me, right?
A Yes.
Q Now, I read you your rights before and Mr. Santiago translated it into Spanish, at that point you

started telling the police what happened the policeman was speaking in spanish also told you those rights about to remain silent and having the right to a lawyer, having the right not to speak to anybody until you speak to a lawyer, about if you couldn't afford a lawyer, a lawyer would be given to you [13bw] for free, that officer told you the same rights in Spanish right?
A Yes, he told me that, he told me that yes when I was in that little room inside there.
Q Is there anything else you would like to tell us?
A Thats it.
Q Okay, I have no further questions. Its now its still May 3rd, 1982, it is now 11:48 p.m.
Q Were you fed since you have been here, did you have anything to eat?
A Yes.
Q Anything to drink?
A Yes, soda that he bought me.
Q Okay, the police have treated you okay?
A Two big macs that he bought me.
Q Thats Detective Tinelli. So they have treated you okay?
A Yes.
Q Okay, its now 11:49 p.m. May 3rd, 1982 this is Assistant District Attorney Karen concluding the interview with Benjamin Cruz.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Ind. No. 1793/82
2232/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EULOGIO CRUZ, DEFENDANT

NOTICE OF APPEAL

SIR:

PLEASE TAKE NOTICE that the above-named defendant, EULOGIO CRUZ hereby appeals to the Appellate Division, First Judicial Department, from a judgment of conviction, conviction the said defendant of Murder in Second Degree, after trial on the 5th day of October, 1983 and thereafter sentenced on the 31st day of October, 1983 to served an indeterminate term in State's prison having a minimum of 15 years and a maximum of life. The said defendant hereby appeals from each and every part of said conviction, including the Sentence.

Dated: Bronx, New York
October 31, 1983

Very Truly Yours,

EULOGIO CRUZ
Defendant-In-Person
1414 Hazen Street
East Elmhurst, NY

TO: HON. MARIO MEROLA
District Attorney, Bronx County
851 Grand Concourse
Bronx, New York 10451

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 25, 1984

Present—Hon. Theodore R. Kupferman, Justice Presiding

David Ross
John Carro
Arnold L. Fein.
Fritz W. Alexander, II, Justices.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

—against—

EULOGIO CRUZ, DEFENDANT-APPELLANT

ORDER OF AFFIRMANCE ON APPEAL
FROM JUDGMENT
20988

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. Bronx County (Joseph Cerbone, J.), rendered on October 31, 1983, convicting defendant of murder in the second degree, and said appeal heaving been argued by Robert Dean of counsel for the appellant, and by Mark L. Freyberg of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

JOSEPH J. LUCCHI
Clerk

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

EULOGIO CRUZ, APPELLANT

ORDER GRANTING LEAVE

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein * questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to § 460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York
January 3, 1985

/s/ Bernard S. Meyer
Associate Judge

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* Description of Order:
Order of the Appellate Division, First Department, entered October 25, 1984, affirming a judgment of the Supreme Court, Bronx County, rendered October 31, 1983, convicting defendant of murder in the second degree.

COURT OF APPEALS
STATE OF NEW YORK

THE HON. SOL WACHTLER, *Chief Judge*, Presiding

No. 413

THE PEOPLE &C., RESPONDENT

v.

EULOGIO CRUZ, APPELLANT

The appellant in the above entitled appeal appeared by William E. Hellerstein, Esq., The Legal Aid Society; *the respondent appeared by* Hon. Mario Merola, District Attorney, Bronx County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Jasen and Titone concur. Judge Kaye dissents and votes to reverse in an opinion in which Judge Meyer concurs. Judge Alexander took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Bronx County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office. Albany, October 17, 1985

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 413

THE PEOPLE &C., RESPONDENT

v.

EULOGIO CRUZ, APPELLANT

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2 No. 414

THE PEOPLE &C., RESPONDENT

v.

BELTON BRIMS, APPELLANT

OPINION

Case #413—People v Cruz (Eulogio)

Order affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Jasen and Titone concur. Judge Kaye dissents and votes to reverse in an opinion in which Judge Meyer concurs. Judge Alexander took no part.

Case #414—People v. Brims (Belton)

Order affirmed. Opinion by Judge Simons. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Titone concur. Judge Alexander took no part.

Decided October 17, 1985

SIMONS, J.

Defendant Eulogio Cruz has been convicted of murder second degree committed during the course of a gas station robbery in the Bronx. Defendant Belton Brims has been convicted of two counts of murder second degree and other crimes committed during the burglary of a private home in Spring Valley, New York. Both defendants were tried jointly with co-defendants and the principle issues submitted in these appeals are whether the courts' refusal to grant defendants' motions for severance resulted in trials impermissibly flawed contrary to the rule of *Bruton v United States* (391 US 123; *see, also, Roberts v Russell*, 392 US 293), and if not whether reversal is nevertheless required because the prosecutions failed to meet minimum standards of fairness (*see, People v Payne*, 35 NY2d 22; *People v La Belle*, 18 NY2d 405). In each trial statements of the co-defendants and the defendants were received in evidence. The basis for defendants' claims are their assertions not only that the content of their non-testifying co-defendant's statements did not "interlock" with their own but that even if the statements were substantially the same, defendants were prejudiced because the reliability of the co-defendants' confessions, made in the controlled environment of a police station, to police officers and under circumstances rendering them more credible, was greater than that of defendants' alleged confessions, made to lay witnesses having motives to falsify. Because of this difference in reliability, defendants contend that the jurors must have used the co-defendants' statements to resolve any doubts about defendants' guilt, even though they were instructed not to do so. Defendant Brims urges other grounds for reversal but those claims are either unpreserved or harmless (*see, People v Crimmins*, 36 NY2d 230). Neither defendant challenges the sufficiency of the evidence and, in the absence of legal error, the convictions should be upheld.

There should be an affirmance. The introduction of a co-defendant's testimony may, in some instances, substantially impair the defendant's right to confrontation or to a fair trial. The confessions of the defendant and co-

defendant in each of these cases interlocked, however, and even though they differed in length and in the circumstances under which they were made, the co-defendant's statements could properly be received with appropriate limiting instructions, regardless of differences in their comparative reliability (*People v McNeil*, 24 NY2d 550, *cert denied sub nom Spain v New York*, 396 US 937; *Parker v Randolph*, 442 US 62). Because defendants' statements not only interlocked with those of their co-defendants, but also contained legally corroborated admissions of all the elements of the crime of which they were convicted, defendants were not denied a fair trial and the motions for severance were properly denied.

PEOPLE v CRUZ

Defendant Cruz was indicted with his brother, Benjamin, for the felony murder of a gas station attendant committed November 29, 1981. Jerry Cruz, who was not related to defendant, was also a participant in the robbery. Some five months later Jerry Cruz was killed and during the course of the investigation of the homicide, the police interviewed his brother, Norberto. Norberto told the police that defendant and Benjamin came to his apartment the morning after the gas station robbery and that at the time defendant was nervous and wearing a blood-stained bandage around his right forearm. Norberto said that defendant told him that he and Benjamin had gone to a gas station in the Bronx the night before intending to rob it and that during Eulogio's struggle with the attendant the attendant had bent down behind the counter, procured a gun and shot him in the arm. Defendant said that Benjamin then jumped up and shot the attendant. Norberto said Benjamin told him a similar account of the incident, although he did not explain to Norberto how defendant was injured or that the brothers had gone to the station that night intending to rob it. Norberto said that he had offered to take defendant to the hospital for treatment of his wounds but defendant refused to go

because to do so was "very dangerous". At the trial, Norberto testified that he had been a friend of Eulogio's for 25 years, since they had grown up together in Puerto Rico. He remembered the date Eulogio and Benjamin came to his apartment because his wife was discharged from the hospital that day. When asked on cross-examination why he had not gone to the police earlier with this information, Norberto said that he could not because his brother Jerry "had the event".

Shortly after Norberto's statements to the police, Benjamin Cruz learned that they were looking for him and went to the police station. While he was being questioned about the death of Jerry Cruz, he blurted out that he and defendant had killed the gas station attendant in the Bronx. Subsequently he gave a complete confession to the police which was recorded on video tape. Defendant and his brother were indicted together for felony murder.

Before the trial defendant moved for a severance, but the motion was denied (*see*, 119 Misc 2d 1080). Both Norberto's testimony implicating the brothers and the video tape of Benjamin's confession were received in evidence during the trial with appropriate limiting instructions. The first trial was aborted because of juror misconduct but the confessions were again received at a second trial which resulted in the judgment now before us convicting defendant. In addition, the People presented police testimony, forensic evidence and photographs which established the robbery and the killing, the location of the victim's body, the injuries to his face and the substantial damage to the office, inferentially establishing defendant's struggle with the attendant before the murder. Also introduced was medical evidence of the trajectory of the bullets as they entered the victim's head from above, corroborating the evidence that Benjamin was above the attendant when he shot him. Defendant offered no evidence and both defendants were convicted of felony murder.

BELTON BRIMS

Defendant Belton Brims was convicted of two counts of intentional murder, two counts of felony murder, two counts of robbery first degree and two counts of burglary first degree. The charges arose out of an incident occurring December 28, 1980 when defendant and James Sheffield, with the assistance of Sheryl Sohn and Willie Brims, burglarized Sheryl's home and killed her parents. On January 1, 1981 defendant was arrested in New York on three other felony charges. He was a prime suspect in the Sohn murders at the time but, after he waived extradition, he was returned to New Jersey to answer felony charges against him there. Brims was subsequently convicted in New Jersey of armed robbery and sentenced to a term of imprisonment of twenty-five years to life. In the meantime, defendant, Sheryl Sohn and James Sheffield were indicted in New York for multiple charges arising out of the Sohn homicides. Defendant was returned to New York and the three defendants were tried together.

None of the defendants testified, but Sheryl Sohn's confession to the police, in which she told the police that she had helped Brims and Sheffield enter her parents' home the evening of the crime, was received in evidence against her. She said she had met the two men at a bar and told them she would unlock the door for them; they could await her parents' return from a party and then, when they returned, rob them. She also agreed that they could have all the valuables they found, except for a diamond ring which her mother would be wearing that she wished for herself. Sheryl said that defendant and others left for the house while she remained at the bar with a friend, but they returned shortly thereafter and told her they were unable to get in. She went home, checked the door again to insure that it was unlocked, and then returned and told defendant and Sheffield. Apparently they were still unable to enter the house and returned to the bar a third time. At that time Sheryl

explained the floor plan of the house to the defendants and they left. Her oral statements were later reduced to writing and admitted at the trial. Her statement was redacted to eliminate references to other crimes but the names were left in it.

The People introduced two prior statements by defendant. One was made to his cousin, Willie Brims, who had gone to the Sohn house with defendant and Sheffield but remained in the car while they were inside. Willie Brims was not charged with any crime despite his participation that night. He testified about the several trips from the bar to the house and return while defendant and Sheffield tried to gain entry, about leaving the house after the crime, and about the place where the participants had disposed of various pieces of evidence that night. Willie testified that when defendant returned to the car after leaving the Sohn's house on the night of the crime, he told him that he had "done some serious business" inside. Defendant explained that statement to him a few days later. He said that when the Sohns had returned to the house that night Sheffield "had beat [Mr. Sohn's] brains out with the butt of a gun" and that he had "drowned the bitch". Defendant said he had made Mrs. Sohn drink gin before drowning her and that she had fainted when she saw her husband assaulted. He then dumped her into the bath tub he had filled with water, face down. During this conversation with Willie, defendant showed him a photo of Jackie Shoulders and said she was his girlfriend. Defendant told Willie to "be cool" and in thirty to ninety days they would be paid [for the jewelry].

The People introduced another statement of defendant made to John Riegel, a New Jersey prisoner occupying a cell near defendant during his incarceration there in January, 1981. Riegel had been a former assistant bank vice-president and private entreprenuer who, after a series of financial setbacks, had turned to crime. Between 1977 and 1981 he had been the subject of several

charges involving forgery, issuing bad checks and the use of stolen credit cards.

Riegel testified that, during the nine days they were together in jail, defendant told him that he had planned the Spring Valley robbery with the slain couple's daughter, that he and his partner had waited in the house until the victims had returned home and that he had drowned the woman. Defendant said he had told his partner to kill the husband by hitting him over the head. Riegel said that defendant claimed he had received about twenty to twenty-two thousand dollars in the robbery and that all the daughter wanted for her help was a diamond ring. Defendant also told him that he had given part of the jewelry to a young girl from Virginia (Jackie Shoulders). Defendant was worried because her name was on a slip of paper in his pants pocket and, if the police found the slip and located her, they would discover that she had received from him a valuable piece of jewelry missing after the robbery.

There was substantial evidence to corroborate these confessions, indeed the evidence of defendant's guilt was overwhelming. Some of the more significant items included evidence of blood discovered in Willie's car in places consistent with his testimony about his passengers and where they entered and exited the car after the killings, and the ski mask and gun used the evening of the crime, found discarded as he had described. Forensic evidence was introduced which established that the gun was broken and that the pattern injuries on Mr. Sohn's skull exactly matched its shape. Forensic evidence also established that blood found on defendant's sneakers after the crime was the same, a very rare blood type possessed by Mr. Sohn. Defendant attempted to establish an alibi, that he was in New York City acquiring drugs for Sheryl at the time of the killing, but even his witnesses failed to support his alibi.

The Legislature has provided that the prosecution of two or more parties charged with the same offense or

offenses may be joined for trial (CPL 200.40). Recognizing that joinder results in prejudice, however, it granted the court the power to order separate trials when the public policy considerations of trial convenience, economy of judicial and prosecutorial resources and speed which underlie the statute are outweighed by unfairness to the accused. An application for severance is addressed to the Trial Judge's discretion. He must decide whether possible unfairness will result, whether it can be minimized by measures short of separate trials or whether severance is required. Normally, the trial court's ruling on the motion will not be disturbed but his discretion is not absolute, nor is his determination final, for "[a] retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning" (*People v Fisher*, 249 NY 419, 427). Accordingly, we may properly review the courts' severance rulings in these two appeals.

When two defendants are tried together, the extra-judicial statement of one is hearsay as to the other and, if the statement is admissible at all, it may be admitted only when the jury is properly instructed that it may not consider one defendant's statement as evidence in assessing the guilt of the other. In *Bruton* the Supreme Court held that because of the substantial risk that a jury, despite such instructions to the contrary, will look to the incriminating extra-judicial statements of a non-testifying co-defendant, admitting such a confession violates defendant's right of confrontation (*Bruton v United States*, 391 US 123, *supra*; *see also*, *People v Safian*, 46 NY2d 181, 187, *cert denied* 443 US 912). A recognized exception to the *Bruton* rule holds that if the statements of the defendant and co-defendant are substantially identical, or "interlock", there is no violation of defendant's right to confrontation. The rationale is that if the statements interlock, the co-defendant's statement is no more inculpating than is defendant's statement. It can hardly have the "devastating effect" on defendant's case re-

ferred to in *Bruton* if defendant similarly has admitted his complicity in the crime (*see, People v McNeil*, 24 NY2d 550, 553, *supra*). Key also is recognition that the right to confrontation is not absolute (*Dutton v Evans*, 400 US 74, 89; *People v Sugden*, 35 NY2d 453, 460). The confrontation clause is intended to insure fairness and accuracy by giving a defendant an opportunity to challenge evidence against him, particularly a co-defendant's statement, even though the jury may not consider it, because of the natural tendency of a co-defendant to shed blame and implicate his accomplice. The danger that the jury will consider unreliable hearsay is minimized, however, when the defendant has confessed. For these reasons, the interlocking confession exception to the *Bruton* rule was recognized early by this Court (*People v McNeil, supra*; *People v Galloway*, 24 NY2d 935) and by lower federal courts (*see, e.g., United States ex rel. Catanzaro v Mancusi*, 404 F2d 296, *cert denied* 397 US 942 [CCA 2]; *Mack v Maggio*, 538 F2d 1129 [CCA 5]; *United States v Walton*, 538 F.2d 1348 [CCA 8], *cert denied* 429 US 1025; *United States v Spinks*, 470 F2d 64 [CCA 7], *cert denied* 409 US 1011; *Metropolis v Turner*, 437 F2d 207 [CCA 10]; but *cf. United States v DiGilio*, 538 F2d 972 [CCA 3], *cert denied sub nom Lupo v United States*, 429 US 1038) and the Supreme Court of the United States has similarly recognized it (*Parker v Randolph*, 442 US 62). Indeed, one observer has interpreted the plurality opinion in *Parker* as holding that, as long as the defendant has confessed, "interlocking" is not required (*see*, Dawson, Joint Trials of Defendant in Criminal Cases; An Analysis of Efficiencies and Prejudices, 77 Mich L. Rev. 1379, 1421; *but see, Parker v Randolph*, 422 US 62, *supra*, at 75).

Confessions are "interlocking" if their content is substantially similar (*People v Smalls*, 55 NY2d 407, 415; *People v Safian*, 46 NY2d 181, *supra*, at 184; *Forehand v Fogg*, 500 F Supp 851, 853; *compare People v McNeil*,

supra, at 552 ["almost identical"]). The statements need not be identical, it is sufficient that both cover all major elements of the crime involved (*see, People v Woodward*, 50 NY2d 922; *People v Berzups*, 49 NY2d 417, 425; *Tamilio v Fogg*, 713 F2d 18, 20) and are "essentially the same" as to motive, plot and execution of the crimes (*United States ex rel. Ortiz v Fritz*, 476 F2d 37, 39; *Forehand v Fogg, supra*; *cf. United States v Kroesser*, 731 F2d 1509). Statements are substantially similar when defendant's confession is close enough to the co-defendant's with respect to the material facts of the crime charged to make the probability of prejudice so negligible that the end result would be the same without the co-defendant's statement (*People v Berzups, supra*, at 425; *People v. Safian, supra*, at 188; *see, also, People v Fisher*, 249 NY 419, 426). Confessions do not "interlock" if a co-defendant's confession may be used to fill material gaps in the necessary proof against defendant (*see, People v Smalls, supra*; *People v Burns*, 84 AD2d 845).

The two sets of confessions before us interlock. There are differences, of course. There always will be, given human nature, the variations in human recall and the manner in which witnesses testify. Indeed, as a practical matter the evidence of witnesses is usually more suspect if they harmonize too closely. But the Cruz brothers agree, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed. Although Benjamin's statement was substantially longer, the details included did not contradict or modify the essential elements of defendant's statement. The content of the confessions in *Brims* was markedly different, more because Sheryl Sohn had not entered the house and did not know or apparently contemplate that homicides would occur. But to the extent of her knowledge of the crime, her statement fully interlocked with defendant's two confes-

sions. Thus, she described the agreement with defendant and Sheffield, the several trips to the house to provide entry and the arrangement for disposition of the jewlery. Sheryl's confession, admissible only as to her, could hardly have prejudiced defendant whose recitation in his confession of the same events she described was substantially similar. Indeed, it is difficult to perceive how Sheryl's confession, which described only the preliminary arrangements with defendant, could have a "devastating" effect on defendant in view of his two confessions reciting the gory events that took place once he and Sheffield entered the Sohn home and murdered Sheryl's parents (*cf. People v Smalls, supra*).[1]

Defendant's major complaint is not that the content of the confessions was dissimilar but that they differed in reliability; in the *Cruz* case Benjamin's 22 minute video-taped confession to the police was contrasted with defendant's oral confession to a friend with a possible motive to falsify[2] that was not revealed to the police for five months; in *Brims* a written confession to police officers was compared to oral confessions to, first, an accomplice who was extended leniency by the prosecutor and, second, a fellow prisoner awaiting disposition of the charges against him.

The contention that the exception to the *Bruton* rule for interlocking confessions does not apply when the confessions differ as to reliability has been rejected by this Court (*see, People v Woodward*, 50 NY2d 922, *affg* 66 AD2d 866 [*see, dissenting opn* of Shapiro, J. for facts at p 866]) and other courts (*see, People v Santanella*, 63 AD2d 744, *lv to app denied sub nom People v Tamilio*,

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[1] On a related point made by defendant Brims, there was no error in receiving his two confessions although they differed in minor detail. Neither was hearsay as to him.

[2] Defendant speculates that Norberto may have sought revenge against him for the death of Jerry Cruz. There is nothing in the record to support that claim.

45 NY2d 784, *cert. denied sub nom Tamilio v New York*, 443 US 912; *Tamilio v Fogg*, 713 F2d 18, *revg* 546 F Supp 364). Indeed, when the rule was announced it was both anticipated that there would be differences in the scope and reliability of the confessions, and accepted that such differences would be tolerated (*see, dissenting opns* in *People v McNeil*, 24 NY2d 550, *supra*, and *Parker v Randolph*, 442 US 62, *supra*). Thus, decisions following the *McNeil* case have held that the use of the confessions is not foreclosed because one confession is oral and the other is written (*People v Woodward, supra*; *Parker v Randolph, supra*) because one is made to police officers and the other to lay witnesses (*Tamilio v Fogg, supra*), or because one is long and the other is short (*see, People v Woodward, supra*; *People v Safian*, 46 NY2d 181, *supra*). Nor is the rule any different because defendant repudiates his confession or challenges its voluntariness. None of the confessions in these two prosecutions was unreliable as a matter of law and once admissibility was determined by the court, credibility was a question for the jury (*People v Woodward, supra*; *People v Anthony*, 24 NY2d 696, *cert denied* 396 US 991; *United States ex rel. Dukes v Wallack*, 414 F.2d 246, 247; *United States ex rel. Catanzaro v Mancusi*, 404 F2d 296, *supra*).

Defendant Cruz argues that, quite independent of any error in ruling on his constitutionai right of confrontation, he is entitled to reversal because the trial violated fair-trial standards applicable to trials in New York involving multiple defendants and the violation resulted in "injustice or the impairment of substantial rights" (*see, People v Payne*, 35 NY2d 22, 26-27, *supra*; *People v La Belle*, 18 NY2d 405, 409, *supra*; *People v Fisher*, 249 NY 419, 427, *supra*; *People v Evans*, 99 AD2d 452). Defendant's right under that standard is broader than his right to confrontation. It may be violated even where the co-defendant has remained silent both before and during the trial or conversely has chosen to testify. A de-

fendant's right to a fair trial is not impaired, however, when there is substantial evidence of guilt independent of the co-defendant's statement (*see, People v Fisher, supra*, p 426), or when the defendant has himself made inculpatory admissions substantially identical to those offered against him, and that admission, properly corroberated, establishes the crime (*see, People v Snyder*, 246 NY 491), i.e., when the error is harmless or when there is no substantial risk of prejudice. Defendant's fair trial rights are violated, however, when he is prevented, because of the complexities of a joint trial, from presenting exculpatory evidence (*see, People v La Belle, supra*), or when, although defendant's right to confrontation has not been impaired, his co-defendant's confession includes material evidence of crime which results in substantial prejudice to defendant by filling gaps in the evidence against him. Thus, in *Payne* a severance was ordered because defendant's confession implicated him in lesser criminal activity, but did not resolve the question of whether he was guilty of felony murder. The court found a substantial risk that the missing evidence could be filled, and apparently was, by reference to the co-defendant's confession (*People v Payne, supra*).

The statement of defendant contained all the necessary elements to incriminate him in the felony murder. It interlocked with Benjamin's statement and it was corroborated by independent evidence sufficient to warrant the jury in accepting it as true, and sufficient to support a guilty verdict. That being so, the trial court could properly deny severance finding, in the sound exercise of its discretion, that there was no substantial risk that the jury would borrow information from Benjamin's hearsay statement to fill gaps in the evidence against defendant. If defendant was prejudiced by the joint trial, the prejudice resulted not from the fact that Benjamin's statement added substantial weight to the proof of defendant's guilt but from the fact that the denial of a severance prevented defendant from obtaining a more

favorable atmosphere in which to attack his confession. That may have harmed his case tactically, but it did not deny his fundamental right to a fair trial (*see, United States v Losada*, 674 F2d 167, 171; *United States v Werner*, 620 F2d 922, 928).

Somewhat similar to defendant Cruz's fair trial claim is defendant Brims' claim that he was prejudiced because he was prevented from calling Sheryl Sohn as a witness. There was nothing before the court, however, to indicate that Sheryl would testify for defendant or that her testimony would tend to exculpate him if she did (*see, People v Owens*, 22 NY2d 93, 97-98; *People v Kampshoff*, 53 AD2d 325, 338, *cert denied* 433 US 911).

Finally, defendant Brims contends that the defendants' defenses were antagonistic. A claim of antagonism may arise from a variety of circumstances, not easily cataloged, but it is clear that severance is not required solely because of hostility between the defendants, differences in their trial strategies or inconsistencies in their defenses. It must appear that a joint trial necessarily will, or did, result in unfair prejudice to the moving party and substantially impair his defense (*People v La Belle*, 18 NY2d 405, *supra*; *People v Papa*, 47 AD2d 902; *see, generally*, Anno Antagonistic Defenses as Ground for Separate Trials of Co-defendants in Criminal Case, 82 ALR3rd 245; Dawson, Joint Trials of Criminal Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich L Rev 1379, 1422-1425). Indeed, some courts have looked to see if the defenses are directly and mutually antagonistic before granting a severance, believing that the accuseds are not entitled to separate trials if one defendant seeks to exculpate himself by inculpating the other (*see, Rhone v United States*, 365 F 2d 980; *People v Braune*, 363 Ill 551, 2 NE2d 839).

It was Brims' contention at trial that he was innocent of the crime, that he had seen Sheryl Sohn that evening, but that he had been in New York City obtaining drugs

and returned only after the murders had been completed. He claimed that he obtained the Sohn jewelry from a friend of Sheryl's in exchange for supplying her with drugs. Sheryl Sohn's principal defense was to contest the voluntariness of her confession for, without it, there was no case against her. Failing this, she sought to establish that she did not actively participate in the robbery-murder and that she did not know the perpetrators would be armed. There were a few questions designed to establish that she acted out of fear of Brims because of money she owed him for prior drug transactions, but the evidence of duress was so slight that counsel neither argued the point in the summation nor requested a charge on it. Despite defendant's general claims that Sheryl Sohn's presence in the trial impeded his defense or reflected unfairly on him by causing the jury to unjustifiably infer he was guilty, there is nothing before us to establish that he was prevented from presenting exculpatory evidence by the court's desire to protect his co-defendant's rights. His present claim that he was prevented from establishing that he received the jewelry from Sheryl as payment for her prior drug purchases is contrary to his testimony at trial.

Accordingly, in each case, the order of the Appellate Division should be affirmed.

DISSENTING OPINION

JSK (dissenting)

With respect to *People v Cruz*, today's decision falls far short of the standards recognized by the majority. The concern expressed in *Bruton v United States* (391 US 123) was that substantial weight would impermissibly be added to the government's case if a codefendant's powerfully incriminating extrajudicial statements, not subject to cross-examination by defendant, were admitted at a joint trial. The exception to the *Bruton* rule for "interlocking confessions" rests on the premise that where two confessions are virtually identical, the jury in assessing defendant's guilt gains little or nothing from the co-defendant's confession. But confessions do not interlock if the co-defendant's confession may be used to fill material gaps in the necessary proof against defendant.

By no stretch of the imagination can it be said that the 22-minute videotaped confession of defendant's brother to the prosecution—inadmissible against defendant—added no substantial weight to the government's case against defendant, or did not fill material gaps in the necessary proof against him. The only direct incriminating evidence against defendant was his alleged statement to Norberto (*see*, *People v Cruz*, 119 Misc2d 1080, 1084), recapitulated in one question and answer during Norberto's brief testimony:

> "Q. What did [defendant] tell you?
>
> "A. That they had gone to give a hold up to a gas station and that he started struggling with him.
>
> THE COURT: Excuse me, speak up. Raise your voice.
>
> "A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station."

Norberto had a prior record; worked intermittently "on the street" as a mechanic and received welfare payments for his family of six; accepted money from his brother, Jerry, who lived with him, though he testified he had no notion of how Jerry got that money; testified earlier that Benjamin—not defendant—had made the confession to him; and most significantly, reported nothing of defendant's alleged statement to him for five months, until after his brother Jerry had been murdered and defendant, in Norberto's words, "tried to take me to the place where they had killed my brother."

The videotape played to the jury, by contrast, was a 22-minute depiction of the crime by defendant's own brother, explicitly detailing his role as well as defendant's. In its reliability it was so overpowering that it necessarily added credibility to Norberto's testimony, and erased the indicia of nonreliabiilty. As an example, while Norberto in his testimony related only that Benjamin and defendant had gone to hold up the gas station, Benjamin in his confession stated that several persons, including Norberto's brother Jerry, had done many holdups together including the one in issue. The clear statement * of Jerry's complicity explained for the jury not only why Norberto had not come forward with defendant's statement for five months, but also why defendant and Benjamin would have gone to Jerry's residence just after the crime. The jury could hardly have avoided looking to Benjamin's confession to resolve any doubts about whether his brother had in fact confessed to Norberto.

The issue is simply whether on these facts there should have been a severance. I do not find in the prior decisions of this Court the *per se* rule now established by this case

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* Without Benjamin's vivid exposition, the only evidence to fill this logical gap is Norberto's meaningless, or at best ambiguous, comment that he did not come forward sooner because his brother "had the event."

that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed. The rationale of *Bruton* is otherwise rendered meaningless. I would reverse the order below and order a new trial.

SUPREME COURT OF THE UNITED STATES

No. 85-5939

EULOGIO CRUZ, PETITIONER

v.

NEW YORK

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPEALS COURT
OF THE STATE OF NEW YORK

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 9, 1986

No. 85-5939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

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BRIEF FOR THE PETITIONER

PHILIP L. WEINSTEIN*
ROBERT S. DEAN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorneys for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Whether the introduction at a joint criminal trial of the nontestifying codefendant's confession, which factually overlapped with petitioner's own alleged confession but which was far more damaging to petitioner's case, violated the rule of *Bruton* v. *United States*, 391 U.S. 123, that the admission of the nontestifying codefendant's confession, even with limiting instructions that the codefendant's confession is admissible only against the codefendant, deprives a defendant of his rights under the Confrontation Clause.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the New York Court of Appeals (J.A. 74-91)[1] is reported at 66 N.Y.2d 61, 495 N.Y.S.2d 14, 485 N.E.2d 221 (1985). No opinion was rendered by the Supreme Court of the State of New York, Appellate Division, First Department, in its decision (J.A. 71) affirming the judgment against petitioner. 104 A.D.2d 1060, 481 N.Y.S.2d 934 (1st Dept. 1984). The opinion of the Supreme Court of the State of New York, Bronx County (Eggert, J.) (J.A. 22-26), is reported at 119 Misc. 2d 1080, 465 N.Y.S.2d 419 (1983).

JURISDICTION

The order of the New York Court of Appeals (J.A. 73) was entered on October 17, 1985. The petition for a writ of certiorari was filed on November 29, 1985, and was granted on June 9, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1 . . . "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

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[1] Numerals preceded by "J.A." refer to the pages of the Joint Appendix.

STATEMENT OF THE CASE

Introduction

During the early morning hours of November 29, 1981, the police in Bronx County found gas station attendant Victoriano Agostini lying mortally wounded on the station's office floor with two bullet wounds to the head.

Five months later, the police were investigating a different homicide, the killing of one Jerry Cruz (no relation to petitioner). Jerry's brother, Norberto, suspected Eulogio Cruz of having been responsible for his brother's death. Norberto told the police that five months before, on November 29th, Eulogio and Eulogio's brother, Benjamin Cruz, had come to his apartment and had said that they had killed a gas station attendant during a robbery attempt.

Shortly thereafter, an assistant district attorney took a detailed videotaped confession from Benjamin Cruz, in which Benjamin implicated Eulogio. When later arrested, Eulogio made no statement to the authorities.

Eulogio and Benjamin were indicted in New York Supreme Court, Bronx County, for felony murder (N.Y. Penal Law § 125.25[3])[2] and lesser related offenses in connection with the gas station homicide. Upon the People's motion, their cases were consolidated for trial.

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[2] New York Penal Law § 125.25 (subd. 3) states in pertinent part:

A person is guilty of murder in the second degree when:

3. Acting either alone or with one or more other persons, *he commits or attempts to commit robbery*, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. . . . [Emphasis supplied.]

Eulogio's pretrial motion to sever based upon *Bruton* v. *United States*, 391 U.S. 123 (1968), was denied.

At the joint trial, there were no eyewitnesses to the robbery/homicide. The only direct incriminating evidence against either defendant was their alleged oral confessions to Norberto Cruz, and Benjamin's videotaped confession. Both defendants were found guilty of felony murder. Eulogio's judgment of conviction was affirmed on appeal.

First Trial And Motions For Severance

After Benjamin Cruz's pretrial motion to suppress his videotaped confession was denied, counsel for Eulogio Cruz moved to sever the cases of the two defendants on *Bruton* grounds. The court reserved decision and ordered the trial to proceed (J.A. 14-17). At the first trial, before Justice Eggert, the People introduced the videotaped confession and Norberto Cruz testified to the defendants' alleged admissions to him the day of the slaying. Neither defendant testified. Petitioner renewed his *Bruton* argument, but the court denied a severance (J.A. 18-21).

In its written decision (J.A. 22-26), the court found that petitioner's confession to Norberto Cruz and Benjamin's videotaped confession "interlocked" in terms of factual content. The court acknowledged that there was a radical difference between the confessions as to the evidence that they were actually uttered (J.A. 24). It held, however, that for two confessions to come within the "interlocking confessions" exception to the *Bruton* rule, there was no requirement in New York case law or this Court's decision in *Parker* v. *Randolph*, 442 U.S. 62 (1979), that "they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making,

and the reliability of the evidence that the confessions were actually made" (J.A. 25).

The first trial ended in a mistrial because of juror misconduct. Prior to the second trial, counsel again moved for a severance. Justice Cerbone denied the motion based upon Justice Eggert's previous decision (J.A. 27-28).

Accordingly, on September 27, 1983, both defendants jointly proceeded to trial before Justice Cerbone and a jury.

Second Trial

At 5:15 a.m. on November 29, 1981, Police Officers *Dennis Fitzpatrick* and Ronald Zuba drove to the Gasteteria service station in response to a radio report. Upon arrival, Fitzpatrick saw the attendant, Victoriano Agostini, lying on the office floor and bleeding from the back of his head. Agostini was taken to the hospital (T. 35-39).[3] At 8:00 a.m., Detective *Patrick Cirincione* of the police Crime Scene Unit arrived at the gas station. He found blood on the office floor and photographed the scene. No firearms or spent shells were recovered (T. 180-189).

The following day, an autopsy performed on the deceased by Associate Medical Examiner Dr. *John Pearl* revealed the cause of death to be two gunshot wounds to the head. One of the bullets entered the head above the right ear from a distance of three to six inches. The second bullet entered the left front part of the head. The paths of both wounds were "backward, downward," and toward the right. Additionally, the deceased had blunt force injuries on the bridge of the nose, around his eyes, and on his right cheek and left shoulder. The bullet and bullet fragment recovered during the autopsy were .38 caliber projectiles which, according to ballistics expert Detective *Stephen Colangelo*, could have been fired from a .357 magnum handgun (Pearl T. 223-225, 229, J.A. 52-53; Colangelo T. 235-237, J.A. 54).

[3] Numbers preceded by "T" refer to the minutes of the second trial, dated September 27-October 5, 1983.

Defendants' Alleged Statements To Norberto

One Jerry Cruz (no relation to the defendants) was killed on March 15, 1982. Detective *George Wood* was assigned to investigate. On March 16, Wood met with Norberto Cruz, Jerry's brother (T. 192, 206). After having had several conversations with Norberto over the space of more than a month, Wood conversed with him again on April 27, 1982. For the first time, Norberto told Wood of the defendants' alleged visit to his apartment on the 29th of the previous November and statements concerning the gas station homicide (T. 208-209).

Norberto Cruz, age 32, testified that he had been friends with Benjamin Cruz for 15 years and Eulogio Cruz for 25 years (J.A. 31-32). On November 29, 1981, at about 10:00 a.m., Benjamin and Eulogio came to the Bronx apartment which Norberto shared with his common-law wife and children (J.A. 32; T. 122).

Norberto claimed that Eulogio was nervous and had a bloody bandage around the inner part of his right forearm, and that Eulogio declined Norberto's offer to take him to a hospital (J.A. 32-33, 35). The People introduced no evidence, physical or otherwise, to support Norberto's claim that Eulogio suffered an injury to his right forearm. (According to Benjamin's videotaped confession (J.A. 67), the attendant had shot Eulogio in the *left* arm, not the right as Norberto's testimony would have it.)

According to his trial testimony, at this visit Norberto asked Eulogio what had happened, and the response was as follows:

> Q. What did [petitioner] tell you?
>
> A. That they had gone to give a hold up to a gas station and that he started struggling with him.
>
> THE COURT: Excuse me, speak up. Raise your voice.
>
> A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped and fired at the man in the gas station (J.A. 33).

Benjamin then told Norberto his version: Eulogio had sent him to search the attendant but he did not search the man correctly. The attendant, while Eulogio and Benjamin argued, pulled out a gun. After the attendant fired at Eulogio, Benjamin shot the attendant (J.A. 34).

Norberto was impeached, however, with his testimony at the first trial. When asked at that trial who had said what, Norberto testified: "I asked Chino [Eulogio] what had happened, Benjamin spoke" (J.A. 50).

At about 4:00 p.m. the next day, Benjamin came to Norberto's apartment alone (J.A. 35, 41). Benjamin told Norberto to clean the blood off the car because it was dangerous for Norberto's brother Jerry (J.A. 36). (According to Benjamin's videotaped confession, Jerry Cruz was one of the four members of the team that had held up the gas station (J.A. 65).)

The defendants' visit with Norberto on November 29th lasted for about an hour (J.A. 32). At first, Norberto testified that no one else was present in the apartment at the time (J.A. 34). Norberto subsequently testified, however, that Jerry was also present. Eulogio and Benjamin had waited for Jerry to get dressed, then had left with him (J.A. 35, 40-41).

Jerry had lived with Norberto. Norberto claimed not to have known what Jerry had done for a living. Jerry would sometimes give Norberto money for the household; Norberto had never asked about the money's source (J.A. 40-41).

Norberto claimed that he had not told anyone about the November 29, 1981, visit from the defendants because, Norberto testified, "My brother had the event" (J.A. 45). Norberto went to the police, however, after Eulogio took him to the place where his brother died (J.A. 47). At another point Norberto was asked:

> Q. When is the first time you told the police that Eulogio said something to you?
>
> A. That was in [sic] March 14th[4] when Eulogio tried to take me to the place where they had killed my brother (J.A. 46).

Norberto nonetheless claimed that he had volunteered his information to Detective Wood because he was a "good citizen" (J.A. 48).

Norberto admitted to an eight-year-old conviction for driving without a license (J.A. 36-37). For the past ten years, he was a self-employed auto mechanic, practicing

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[4] As Detective Wood testified, Jerry Cruz was killed on March *15*th.

Moreover, Norberto did not in fact remember whether he had told Detective Wood about the November 29th visit during his first conversation with him or later (J.A. 49-50). However, Norberto also testified that he had already spoken to Wood on several occasions before he finally told Wood of that visit (J.A. 48-49).

his trade "in the street," rather than in a shop. That was his only source of income (J.A. 38-39). He recalled testifying at the first trial, however, that he had not worked for the past two years—"since I was suspended from work"—and had been receiving welfare payments during that period (J.A. 38-39).

Benjamin's Videotaped Confession

During his investigation of the Jerry Cruz homicide, Detective Wood made several attempts to contact Benjamin Cruz. On May 3, 1982, Wood met with Benjamin at the 48th precinct with Officer *Peter Ronda* acting as Spanish interpreter (T. 192-194, 210). When Ronda asked him what he knew about the death of Jerry Cruz, Benjamin, rather than answering the question, blurted out: "I shot a guy who shot my brother, Chino in a gas station on 149th" (T. 66-70, 81-82, 95; J.A. 29-30). Later, Bronx County Assistant District Attorney Allen Karen came to the precinct to take Benjamin's videotaped confession (T. 214).

The videotape came into evidence as People's Exhibit 4, over the objection of Eulogio's attorney, and was played for the jury (J.A. 30-31).[5] In the statement, elicited through questioning, Benjamin related the following version of the gas station homicide/robbery:

Benjamin, his brother "Chino" (Eulogio), Jerry Cruz, and one "Pacho" drove to the gas station. Jerry was the driver. They told the attendant to put only one gallon

[5] Prior to the playing of the tape, the court summarily denied the motion by Eulogio's attorney to redact the tape to delete all references to his client (J.A. 30). The only portion of the tape which was redacted was Benjamin's reference at one point to unrelated crimes (T. 117-118).

in the tank. Benjamin then took out a gun, and Eulogio, speaking Spanish, announced the robbery (J.A. 63, 65-66).[6]

While Jerry stayed in the car, the other three went into the office with the attendant. Benjamin had a .357 magnum, Eulogio a .38 caliber long, and Pacho a .38 caliber short handgun. They asked the attendant for his money. The attendant, answering in Spanish, told them, "[T]his is not my money to give away." Eulogio told him that if he did not hand over the money, he would kill him (J.A. 63-65, 67).

Eulogio then said, "Give me all your money," and hit the attendant "on top of the nose" with his gun (J.A. 63). Eulogio and the attendant started fighting. Benjamin went to the office door and asked the attendant to open it. Eulogio and the attendant were still fighting and the latter reported that he could not open it (J.A. 63-64). Pulling out his own gun, a .22, the attendant shot Eulogio once in the left arm. Eulogio again hit the attendant with his gun, then shot at the attendant "like to burn the clothes very close" (J.A. 63-64, 67).

Benjamin told Eulogio to open the door. Instead, Eulogio "threw the gun to the door." Benjamin asked Eulogio to open it, but Eulogio said that he could not. The attendant picked up the thrown gun "like to hit Chino in the head." Benjamin himself opened the door and said to Eulogio "look out." Benjamin extended his arm over his brother's shoulder, pointed his gun at the attendant, and from "very close" range shot him "right between the

[6] The written transcript of this confession appears in the Joint Appendix at J.A. 61-69. This transcript was originally prepared by the Bronx County District Attorney's Office and was part of the certified record before the New York Court of Appeals.

eyes." The attendant fell backward; the men ran away (J.A. 63-65).

The net proceeds of the robbery were $62, which they spent. Benjamin sold the murder weapon for $250. They threw the attendant's .22 caliber handgun away (J.A. 65-68).

The videotaped confession lasted for 22 minutes (J.A. 61, 69).

* * *

Defendant Eulogio Cruz did not present any evidence or offer any testimony. Benjamin Cruz presented two witnesses.

Officer Fitzpatrick's partner, Police Officer *Ronald Zuba*, echoed his partner's version of how they discovered the victim's body at the gas station (T. 274-275). Benjamin's mother, *Lucinda Ramos*, testified that Benjamin had never gone beyond the 5th grade in school, was "dull for his age," and had psychiatric problems (T. 283-284, 287). Benjamin Cruz did not testify at the trial.

The attorneys for both defendants argued in summation, *inter alia*, that Norberto Cruz's testimony was motivated by his belief that the defendants had killed his brother Jerry (T. 306-307, 319; J.A. 55). Counsel for Eulogio Cruz importuned the jurors to follow the court's instruction that Benjamin's confession was not admissible against his client; he maintained that this presented them with a "serious sophisticated problem" (J.A. 55).

The prosecutor argued on summation that Norberto's testimony as to the defendants' statements to him was corroborated by Benjamin Cruz's videotaped responses:

> [What] Norberto Cruz told the police as to what Eulogio Cruz told them and Benjamin Cruz told them is substantiated afterward by Benjamin Cruz himself (J.A. 57).
>
> * * *
>
> Benjamin in his statement corroborates as to what they told [Norberto]. This is afterward, can't get away from it (J.A. 57).

The prosecutor also argued that Norberto's testimony was rendered more convincing by his description of Eulogio's arm wound, since Benjamin's videotaped confession substantiated that Eulogio had been shot in the arm during the robbery (J.A. 58).

During its main charge, the court advised the jury that the statements of each defendant were admissible solely against the declarant (J.A. 59). The court had given similar instructions throughout the course of the trial (T. 22-24, 120-121, 127, 130-131).

After commencing deliberations, the jurors returned to ask for a playback of the videotaped confession and a rereading of all of Norberto Cruz's testimony (J.A. 60). Still later, they requested the definition of "acting in concert" and asked, "If we find one defendant guilty/innocent must we find the other defendant guilty/innocent?" (T. 380). On the second day of deliberations, the jury found both defendants guilty of the only count submitted, felony murder (T. 385-387).

On the date of sentence, counsel for Eulogio moved to set aside the verdict because of the denial of the severance:

> The only testimony against this defendant in this case was a witness who was seeking to revenge [sic] for the death of his brother. Had this defendant been

> tried separately and that testimony be [sic] the only testimony which it was, I can't see how this defendant could possible be convicted beyond a reasonable doubt (minutes of October 31, 1983, p. 2).

Counsel's motion was denied (*id.* at 3).

The court sentenced petitioner to an indeterminate 15-year-to-life term of imprisonment (*id.* at 6). Benjamin Cruz was sentenced to 20 years to life.

State Appeals

On appeal to the intermediate appellate court, the Appellate Division, First Department, of the Supreme Court of the State of New York, petitioner argued, *inter alia*, that the failure to sever deprived him of his Sixth and Fourteenth Amendment right to confrontation. The Appellate Division affirmed the conviction without opinion on October 25, 1984 (J.A. 71).

On October 17, 1985, the Court of Appeals, by a four to two vote, affirmed the Appellate Division's order. In its majority opinion, the court agreed with the trial court's ruling that the disparity in reliability between the defendants' confessions was irrelevant in deciding the *Bruton* question: So long as the confessions interlocked as to factual content, the "interlocking confessions" exception to the *Bruton* rule applied (J.A. 82-83).

In dissent, two judges rejected

> the *per se* rule now established by this case that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed.

> The rationale of *Bruton* is otherwise rendered meaningless (J.A. 90-91).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Pointer* v. *Texas*, 380 U.S. 400 (1965), this Court, in holding the Confrontation Clause of the Sixth Amendment applicable to the states through the Fourteenth Amendment, confirmed that the defendant's right to cross-examine the witnesses against him is crucial to his right of confrontation. Accordingly, unless a codefendant's statement implicating the defendant is subject to cross-examination, or is admissible against the defendant pursuant to a recognized exception to the hearsay rule, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970), or because of other indicia of reliability, *Lee* v. *Illinois*, 476 U.S. ___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), its admission at a joint criminal trial violates the defendant's rights under the Confrontation Clause.

In this case, the nontestifying codefendant's videotaped confession implicating petitioner was admitted into evidence with the limiting instruction that it was admitted solely against the codefendant. It was not admitted or offered into evidence against petitioner. Nor would such admission have comported with the Confrontation Clause: The videotape neither fit into an established exception to the hearsay rule nor bore any other indicia of reliability.

The videotape's inadmissibility against petitioner does not obviate the Confrontation Clause problem in this case, however, for its admission at the joint trial nonetheless ran afoul of this Court's holding in *Bruton* v. *United States*, 391 U.S. 123 (1968).

In *Bruton*, this Court held that a criminal defendant is deprived of his right to confrontation when a nontestify-

ing codefendant's statement inculpating the defendant is introduced at a joint trial, notwithstanding a limiting instruction to the jury that the statement, inadmissible hearsay against the defendant, binds only the codefendant. 391 U.S. at 126. In *Parker* v. *Randolph*, 442 U.S. 62 (1979), the sitting members of this Court split 4-4 on the issue of whether limiting instructions obviated any Confrontation Clause concern where there were "interlocking" confessions of criminal codefendants.[7]

[7] Although this Court's purpose in granting certiorari in *Parker* was to resolve a conflict in the circuits over whether *Bruton* applies at all to "interlocking confessions" situations, 442 U.S. at 68 n.4, the conflict has continued because of the *Parker* split. Of the circuits that have considered the issue post-*Parker*, at least three have adopted the harmless error standard set forth in Justice Blackmun's concurrence. *United States* v. *Ruff*, 717 F.2d 855 (3d Cir. 1983); *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 624 n.11 (9th Cir. 1980); *United States* v. *Parker*, 622 F.2d 298, 301 (8th Cir. 1980). The Seventh Circuit is openly undecided as to which approach to take. *Montes* v. *Jenkins*, 626 F.2d 584, 587 (7th Cir. 1980). At least three circuits have adopted the plurality reasoning. *United States* v. *Kroesser*, 731 F.2d 1509 (11th Cir. 1984); *Tamilio* v. *Fogg*, 713 F.2d 18 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 706 (1984); *Poole* v. *Perini*, 659 F.2d 730, 733 (6th Cir. 1981).

The same conflict exists in the state courts. *Compare, e.g., State* v. *Haskell*, 100 N.J. 469, 495 A.2d 1341, 1346-1347 (1985); *Scott* v. *State*, 49 Md. App. 70, 430 A.2d 615, 619 (1981); *State* v. *Moritz*, 63 Ohio St. 2d 150, 407 N.E.2d 1268, 1273 (1980); *State* v. *Rodriquez*, 226 Kan. 558, 601 P.2d 686, 690 (1979); *Quick* v. *State*, 599 P.2d 712, 723-725 (Alaska 1979) (adopting harmless error approach), *with State* v. *Thompson*, 308 S.E.2d 364, 366 (S.C. 1983); *Tatum* v. *State*, 249 Ga. 422, 291 S.E.2d 701, 703-704 (1982); *State* v. *Gerlaugh*, 134 Ariz. 164, 654 P.2d 800, 804 (1982); *People* v. *Hartford*, 117 Mich. App. 413, 324 N.W.2d 31, 34 (1982); *Hays* v. *State*, 598 S.W.2d 91, 95 (Ark. 1980) (adopting plurality reasoning).

The *Parker* decision has thus been labeled "inconclusive" in resolving the basic analytical conflict. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 Mich. L. Rev. 1379, 1421 (1979). *See also* Marcus, *The Confrontation Clause and Co-Defendant Confessions: The Drift from Bruton to Parker* v. *Randolph*, 1979 U. Ill. L.F. 559, 580-590.

The *Bruton* rule should be adhered to in interlocking confession situations, subject only to harmless error analysis. 442 U.S. at 77-91 (Blackmun, J., concurring). The foundations of the rule, *i.e.*, the importance of the right to confront the codefendant's accusations, and the human impossibility of the task of following the limiting instructions, are fully applicable whether or not the defendant has himself confessed: Defendants do not forfeit any constitutional protections—including the Confrontation Clause—when they have confessed, and the presence of two confessions rather than one does not enhance the average juror's ability to use each confession only against one of the defendants.

It may very well be that the defendant's own inculpatory statement, in a particular case, will render the error harmless beyond a reasonable doubt, as would untainted overwhelming proof of guilt. *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969). But the fact that the error might not affect the substantial rights of some defendants does not cause the Confrontation Clause violation simply to disappear. It merely renders it harmless in those cases.

Since petitioner Eulogio Cruz was forced to trial with his nontestifying codefendant, and the codefendant's 22-minute detailed videotaped confession came into evidence, albeit with limiting instructions, petitioner was deprived of his Sixth Amendment right to confrontation. That a citizen informant (Norberto Cruz) belatedly claimed that petitioner himself made a factually consis-

tent oral confession to him is a factor to be considered in the harmless error analysis, no more.

Under this analysis, the error was not harmless beyond a reasonable doubt, as the codefendant's confession added substantial weight to the People's case against him. Norberto Cruz's testimony that petitioner confessed to him was the only admissible evidence against petitioner linking him to the homicide. There were, looking solely at that testimony, substantial reasons to doubt that the confession was ever uttered. Since, on the other hand, there was no doubt at all that codefendant Benjamin Cruz's videotaped confession fully inculpating petitioner was made, the jury would naturally look to it to resolve its doubts about Norberto's testimony, limiting instructions notwithstanding. The case against petitioner, in reality a weak one, thus became overwhelming in the jurors' eyes. It simply cannot be said "that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [Benjamin's videotaped confession] been excluded." *Schneble* v. *Florida*, 405 U.S. at 432.

If this Court should decide, however, in accordance with the reasoning of the *Parker* plurality, that admission of "interlocking" confessions, with limiting instructions, does not violate the Confrontation Clause at all, petitioner is nonetheless entitled to a reversal. His alleged oral confession of dubious reliability did not genuinely "interlock" with Benjamin's videotaped one.

Even where confessions or statements are factually similar to some degree, aspects of a codefendant's statement may damage the defendant's case significantly more than does his own statement. As this Court recently recognized in a related context in *Lee* v. *Illinois*, 476 U.S.

___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), a codefendant's statement does not "interlock" with the defendant's own for Confrontation Clause purposes "when the discrepancies between the statements are not insignificant." Just as a defendant may be prejudiced by a significant variance in content between the two confessions, so may he be prejudiced by a variance in reliability. A defendant who may be able to convince a jury that his own inculpatory statement was untrue, involuntary, or never uttered at all has everything to gain by being able to confront his codefendant's statement, even if the latter is worded similarly to his own, in an effort to convince the jury that the codefendant's accusations against him are worthless as well. An inability to confront that accusation would be uniquely damaging to that defendant.

So, too, petitioner's challenge to his own alleged confession, reported by a citizen informant of doubtful credibility with a motive to lie, became almost meaningless when the codefendant's videotaped confession came before the jury. Although petitioner might have been able to convince the jurors that his confession was never uttered, he would never have been able to convince them that the videotaped confession naming him did not exist. Thus, it cannot be concluded that "[s]uccessfully impeaching [Benjamin's videotaped] confession on cross-examination would likely [have] yield[ed] small advantage to [petitioner]," *Parker* v. *Randolph*, 442 U.S. at 73, and genuine interlocking did not exist in this case. Because of the damaging nature of the videotape to petitioner and the otherwise weak case against him, the error in failing to sever cannot be deemed harmless beyond a reasonable doubt.

ARGUMENT

THE INTRODUCTION AT PETITIONER'S JOINT TRIAL OF HIS NONTESTIFYING CODEFENDANT'S CONFESSION, WHICH WAS FAR MORE DAMAGING TO PETITIONER'S CASE THAN PETITIONER'S OWN ALLEGED CONFESSION, VIOLATED THE RULE OF *BRUTON* V. *UNITED STATES*, 391 U.S. 123, THAT SUCH JOINT TRIALS, EVEN WITH LIMITING INSTRUCTIONS THAT THE CODEFENDANT'S CONFESSION IS ADMISSIBLE ONLY AGAINST THE CODEFENDANT, ARE VIOLATIVE OF THE CONFRONTATION CLAUSE.

A. The Admission Of The Nontestifying Codefendant's Confession At A Defendant's Joint Trial Violates The Confrontation Clause, Even Where The Codefendant's Confession Overlaps To Some Degree With The Defendant's Own.

In *Pointer* v. *Texas*, 380 U.S. 400 (1965), this Court, in holding the Confrontation Clause applicable to the states through the Fourteenth Amendment, confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him," *id.* at 404, and that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.* at 406-407. Under this principle, unless a codefendant's statement implicating the defendant is subject to cross-examination, or is independently admissible against the defendant pursuant to a recognized exception to the hearsay rule, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970), or because the statement bears other indicia of reliability, *Lee* v. *Illinois*, 476 U.S. ___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), its admission at a joint criminal trial violates the defendant's Confrontation Clause rights.

The codefendant's videotaped confession was not admitted or admissible against petitioner. It was, as an evidentiary matter and under settled New York law, hearsay as to petitioner and inadmissible against him. *E.g.*, *People* v. *Marshall*, 306 N.Y. 223, 117 N.E.2d 265 (1954); *see also* Prince, *Richardson on Evidence*, § 232 (10th ed.). The People did not advance the proposition in the state trial or appellate courts that the videotape was admissible against anyone other than its declarant, codefendant Benjamin Cruz, and the trial court accordingly instructed the jury to consider it only as to the codefendant. Furthermore, its admission against petitioner would not have been consistent with the Confrontation Clause. *Bruton* v. *United States*, 391 U.S. at 136 n.12. The videotape fit into no established exception to the rule against hearsay, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970), and petitioner had no opportunity to test its truth at any time. *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

Nor was the videotape admissible against petitioner as an "accomplice's confession," since those are presumptively unreliable, *Lee* v. *Illinois*, 54 U.S.L.W. at 4555, and the videotape bore no particular indicia of reliability of its contents to overcome that weighty presumption.[8] While the *modus operandi* described in the videotape was largely consistent with the autopsy report and the physical evidence found at the scene, it bore no indicia of reliability as to its *dramatis personae:* No evidence other than petitioner's own alleged confession cor-

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[8] As a threshold matter, any "accomplice's confession" exception would not apply in this case because the declarant, Benjamin, was not "unavailable" to testify. *See United States* v. *Inadi*, 475 U.S. ___, 89 L. Ed. 2d 390 (1986); *Parker* v. *Randolph*, 442 U.S. at 87 (Stevens, J., dissenting); *Kastigar* v. *United States*, 406 U.S. 441 (1972). *But see Lee* v. *Illinois*, 54 U.S.L.W. at 4560-4561 (Blackmun, J., dissenting).

roborated Benjamin's videotaped claim that petitioner was one of the members of the hold-up team or that he was shot in the arm. Nothing in that videotaped confession precludes the possibility that Benjamin named Eulogio as one of his fellow robbers solely in a slow-witted desire to curry favor with the police (to whom Norberto had already inculpated not only Benjamin but Eulogio as well), or in a desire to avenge himself against his brother. Indeed, the videotaped confession itself circumstantially corroborates that very possibility. In it, Benjamin heaped substantial blame on petitioner—as the one who demanded money, threatened to kill the attendant, fought with and injured the attendant, and fired the first shot—while minimizing his own culpability, as the one who merely shot the attendant to protect his by then unarmed brother from the attendant's own gun. Also, the videotaped confession was untested by any truth-determining process: it was elicited in response to interrogation, without any contemporaneous cross-examination or the equivalent.

Moreover, to say that Benjamin's videotaped confession is reliable because it is corroborated by petitioner's own factually consistent confession is to ignore the substantial evidence, discussed fully *post* at pp. 27-29, that petitioner never uttered this alleged confession at all.[9] Clearly, if the very existence of petitioner's own confession is dubious, that confession can hardly suffice as proof of the reliability of Benjamin's accusation against petitioner.

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[9] In *Lee*, this Court recognized that the defendant's own interlocking confession might supply the proof necessary to establish the reliability of the codefendant's accusation against the defendant. This Court held, however, that the confessions at issue did not truly interlock as to their factual content, and the Court did not otherwise outline the criteria for "interlock." 54 U.S.L.W. at 4558-4559.

Even though the videotaped confession was not admitted into evidence against petitioner, its introduction at the joint trial nonetheless deprived petitioner of his rights under the Confrontation Clause. In *Bruton* v. *United States*, 391 U.S. at 123, this Court held that a criminal defendant is deprived of his right to confrontation when a nontestifying codefendant's statement inculpating the defendant is introduced at a joint trial, notwithstanding a limiting instruction to the jury that the statement binds only the codefendant. The ruling fully applies to petitioner's case.

The *Bruton* ruling was based upon the recognition of two incontrovertible truths: the importance of the right to confrontation, and the inability of jurors to follow limiting instructions that are humanly impossible to follow. Neither proposition is any less true when the defendant has also made an inculpatory statement, as discussed below.

The proposition advanced by the plurality in *Parker* v. *Randolph*, 442 U.S. at 64-76, that the admission of the nontestifying codefendant's statement with limiting instructions is entirely consistent with the Sixth Amendment, so long as the defendant has himself confessed, was apparently based upon two different but related rationales. The first is that cross-examination of the codefendant would "likely yield small advantage" and be of "far less practical value" to the confessing defendant. 442 U.S. at 73. The second is that any inability on the part of the jury to follow the limiting instructions will not be "devastating" to the confessing defendant. *Id.* at 74. Upon close analysis, neither rationale logically supports the plurality's conclusion.

As the *Parker* dissent noted, 442 U.S. at 84, a defendant who has "confessed" is no less entitled to the protec-

tion of the Confrontation Clause than one who has not. The fact that exercising such a right would have "yield[ed] small advantage" does not mean that the right never existed, any more than a criminal defendant who has been denied his Sixth Amendment rights to be represented by counsel or testify on his own behalf at his trial has forfeited those rights simply because his guilt is so clearly made out by his own confession that exercising them would have "yield[ed] [him] small advantage." Moreover, it simply cannot be posited that once a defendant has "confessed," the outcome of the trial is a foregone conclusion and the exercise of his right to confrontation would be fruitless. Petitioner's case is a prime example: the mere fact that a third party attributed a confession to him did not so damn him that any efforts to dispute his guilt would have been fruitless; if anything damned him, it was his inability to confront his brother's accusations.

The second prong of the plurality's analysis also does not bear close scrutiny. If jurors will be unable to disregard a codefendant's statements if the defendant has remained silent, neither will they be able to do so if the defendant has made an inculpatory statement; the jury's improper *use* of the codefendant's confession remains a constant. The plurality's reasoning did not seriously dispute this; rather, it asserted that the impact of the jurors' inability to keep the confessions separate will not be "devastating" when the defendant has himself confessed. 442 U.S. at 74.

Again, this assertion and, indeed, the animating assumption of the entire *Parker* plurality's decision, relies on the perceived "probative" weight of an "unchallenged" confession.[10] Certainly, that assumption is inapplicable to

[10] Thus, the plurality asserted that the "most probative" piece of evidence is a defendant's own confession, that "one can scarcely

a case, such as the instant one, where a defendant does in fact maintain his innocence at trial and directly attacks the validity and even the existence of the "confession." In such a case, presumptions of probative weight are inappropriate, and the extent to which a defendant has been convicted by his own confession or devastated by a codefendant's accusation requires an *ad hoc* determination by the reviewing court, under a traditional harmless error analysis. As the *Parker* dissent noted, 442 U.S. at 86, a confession is not necessarily more conclusive than fingerprint, photographic, or other untainted evidence of guilt. When a nonconfessing defendant is confronted with such overwhelming evidence, we do not say that he has forfeited the right to confront any witness against him. If a *Bruton* error occurs at such a trial, to say that it is harmless does not mean that it never occurred at all.

In particular cases, an appellate court will determine that a *Bruton* violation did not affect the outcome of the trial, and will affirm the conviction. The affirmance results not because the potential for prejudice recognized in *Bruton* never existed, but because the potential for prejudice was not realized in that case: Either the damaging nature of the defendant's own confession or the overwhelming untainted proof of guilt rendered the error harmless beyond a reasonable doubt. *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969).[11]

imagine evidence more damaging to his defense than his own admission of guilt," and that the defendant who tenders an "unchallenged" confession differs dramatically from one who "maintain[s] his innocence." *Id.* at 72-73.

[11] The question whether to adopt a harmless error standard or a *per se* rule is not merely "a legal nicety" despite the fact that the focus of inquiry for *appellate* courts, *i.e.*, whether confessions truly "inter-

In short, the full force of the *Bruton* ruling should apply even if it happens that the defendant has also made an

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lock," may be the same. *E.g.*, *Metropolis* v. *Turner*, 437 F.2d 207, 208 (10th Cir. 1971). The question is of great importance to *trial* judges confronted with a pretrial motion to sever. As at least two courts have recognized, those judges should not be expected to sanction, prior to trial, commission of constitutional error by failing to sever, on the theory that an appellate court will most likely deem it harmless because confessions appear to interlock. *State* v. *Bleyl*, 435 A.2d 1349, 1363 (Me. 1981); *United States* v. *Corbin Farm Service*, 444 F. Supp. 510, 540 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

Moreover, requiring trial judges to determine pretrial whether a joint trial will prejudice either confessing defendant puts the judge in an impossible situation, since pretrial appearances notwithstanding, the course of trial may reveal that two confessions do not truly interlock, with a reversal as a possible result. *See State* v. *Waterbury*, 307 N.W.2d 45, 49 (Iowa 1981); *State* v. *Bleyl*, *supra*, at 1363; *Quick* v. *State*, 599 P.2d 712, 723-725 (Alaska 1979). For example, a judge deciding a pretrial motion to sever is not in a position to determine whether a defendant who has been unsuccessful in a pretrial motion to suppress his confession as involuntary will be more successful in mounting the same "challenge" directly to the jury, as he has the option to do. *Crane* v. *Kentucky*, 476 U.S. ____, 90 L. Ed. 2d 636, 54 U.S.L.W. 4598 (June 10, 1986).

For these reasons, a number of jurisdictions have endorsed the position that, if effective redaction is impossible, judges confronted with potential *Bruton* situations should follow the reasonable and readily available course of severing, without trying to parse out whether confessions truly interlock. *See State* v. *Haskell*, 100 N.J. 469, 495 A.2d 1341, 1346-1347 (1985); *State* v. *Pacheco*, 481 A.2d 1009, 1017-1019 (R.I. 1984); *State* v. *Moritz*, 63 Ohio St. 2d 150, 407 N.E.2d 1268, 1273 (1980). But even if the "interlocking" determination is one to be made pretrial (*see* Part C, *post*, at p. 30), there is no sound reason to artificially narrow the judge's focus to whether confessions factually overlap, rather than permit the judge to decide the broader question of whether one defendant's confession will cause substantial prejudice to the other defendant.

"interlocking" confession. As Justice Blackmun succinctly stated in his *Parker* concurrence, 442 U.S. at 79:

> I would not adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects.
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> * * *
>
> The fact that confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.

Accordingly, in determining whether to sustain a defendant's conviction after a joint trial, in which his nontestifying codefendant's confession inculpating the defendant has been admitted into evidence with limiting instructions, the ultimate question should not be whether the defendant has confessed or whether his statement "interlocks" with that of his codefendant. Instead, it must be recognized that the defendant has been denied the right to confront the evidence considered against him by the jury, and the test for whether the resultant conviction

can stand is simply whether the defendant has suffered substantial prejudice. If so, the violation of his Confrontation Clause rights cannot be harmless error.

B. The Confrontation Clause Violation Is Not Harmless Where The Codefendant's Confession Adds Substantial Weight To The Case Against The Defendant.

In determining whether a Confrontation Clause violation of this type is harmless beyond a reasonable doubt, the question is simply whether the defendant has suffered substantial prejudice by the codefendant's confession coming before the jury. To deem such an error harmless, then, the court must find either (a) that there was nothing in or about the codefendant's confession which significantly damaged the defendant's case any more than did the defendant's own confession or (b) that the other untainted evidence of guilt was overwelming, so that any damage done to the defendant's case could not have affected the verdict. *Schneble* v. *Florida*, 405 U.S. at 427; *Harrington* v. *California*, 395 U.S. at 250. In neither respect can the error in petitioner's case be judged harmless.

Taking the second prong of this analysis first, the untainted admissible evidence against petitioner was weak; indeed, apart from his own alleged confession to Norberto, there was none. Although there was ample physical evidence at the scene and from the autopsy to establish that a felony murder had been committed, no evidence linked either defendant to the crime except the statements introduced against them. No eyewitnesses or physical evidence placed them at the scene. Neither any instrumentality nor any proceeds of the crime were recovered.

Thus, the People's case against petitioner rested entirely on the jury's finding that petitioner's alleged

statement to Norberto, in which petitioner confessed to felony murder, was actually made. In making this determination, the jurors would naturally look to the videotape to resolve their doubts. Accordingly—looking now at the first prong of the harmless error analysis—it is in this way that Benjamin's videotaped confession inculpated petitioner far more than did petitioner's alleged confession.

Considering petitioner's alleged confession by itself, the jury had ample reason to doubt Norberto's testimony that it ever occurred. Norberto reported nothing of petitioner's alleged statement until some five months after the fact, after his brother Jerry had been murdered and petitioner, as Norberto stated, "tried to take me to the place where they had killed my brother" (J.A. 46). As counsel for petitioner argued on summation (T. 319), Norberto had every reason to try to frame petitioner to avenge petitioner's suspected involvement in his brother's murder.[12] Moreover, Norberto was an inherently unreliable witness with no demonstrated sense of honesty. He had a prior record; received welfare payments even as he

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[12] Although Norberto's prior silence to the police may have been partially motivated by his brother Jerry's membership in the robbery team, the fact of that membership did not clearly come before the jury in evidence admissible against petitioner. Apart from Norberto's testimony about Benjamin's statement to him the day after the crime about cleaning up the car, a statement not admissible against petitioner, Norberto did not testify as to whether his brother Jerry was part of the robbery team. Attempts to elicit such testimony were singularly unsuccessful: When asked on cross why he did not go to the police sooner, Norberto testified that it was because his brother "had the event" (J.A. 45). Neither the lawyers nor the court thought it clear what that statement meant (J.A. 45). Only in the context of Benjamin's statement to Norberto on November 30th and his videotaped confession could it have made sense to the jury, but neither was evidence admissible against petitioner.

plied his trade "on the street" as a mechanic; and took household expense money from his brother Jerry, a professional felon, without (he claimed) asking him about the source of the money. The likelihood that Norberto would fabricate these confessions is circumstantially confirmed by the fact that no reason appears why petitioner and Benjamin would choose to confess to Norberto during what was apparently a casual social call.[13] Most significant, however, in impeaching both Norberto's general credibility and his specific accusation that petitioner had confessed, is the fact (emphasized in counsel's summation [T. 321-322]) that his prior testimony attributed the only confession to Benjamin, not petitioner.

Significantly, there is nothing about the confession attributed to petitioner which demonstrated that it could have come only out of petitioner's mouth. Although the sparse detail contained in the alleged confession (that the victim "bent down" while Benjamin "jumped up and fired") was in some ways consistent with the physical evidence (both bullets followed a "downward" path), such minimal detail could have been based upon second-hand information about the crime that Norberto obtained from someone other than petitioner—for example, Norberto's brother Jerry, a member of the robbery team, or even Benjamin Cruz by himself. For the same reason, Norberto's description of a wound to petitioner's right arm, in the absence of any evidence apart from Benjamin's con-

[13] Although the purpose of the visit by Eulogio and Benjamin might be explained as their picking up their partner in crime, Jerry Cruz, rather than as a casual social call, that explanation would not have been apparent to the jury without evidence that Jerry Cruz was a member of the robbery team. As explained *ante*, n. 12, no such evidence came in on the People's case against petitioner, as opposed to their case against Benjamin.

fession[14] that petitioner ever suffered an arm wound, is corroborative of nothing.

Given the doubts that the jurors may well have had about whether petitioner confessed at all, it is natural that they would have looked to Benjamin's 22-minute detailed confession to resolve those doubts. That confession was memorialized on videotape by the District Attorney's Office. It would be hard to imagine a recording method that would inspire greater confidence that the confession had actually been uttered. In fact, the prosecutor on summation, the court's limiting instructions notwithstanding, repeatedly urged that corroboration of Norberto's testimony about Eulogio's statement could be found in Benjamin's subsequent videotaped confession (J.A. 57).

In short, because Norberto's testimony was the sole link between petitioner and the homicide, the case against him was by no means "overwhelming" and was actually quite weak: Petitioner for no apparent reason confessed to murder to an unreliable informant who, solely to avenge his brother's death, five months later turned petitioner over to the police. The introduction of the videotaped confession, while technically admissible solely against Benjamin, made the case against both defendants appear overwhelming. Certainly, it cannot reasonably be concluded "that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [Benjamin's videotaped confession] been excluded." *Schneble* v. *Florida*, 405 U.S. at 432. The error not being harmless, there must be a reversal.

[14] In Benjamin's videotaped confession, he stated that Eulogio was wounded in the *left* arm (J.A. 67).

C. Even If The Admission of The Nontestifying Codefendant's Confession Does Not Violate The Confrontation Clause If It "Interlocks" With The Defendant's Own Confession, Confessions Do Not "Interlock" If There Is Anything In Or About The Codefendant's Confession That Inculpates The Defendant Significantly More Than Does The Defendant's Own Confession.

If this Court should adopt a *per se* rule that *Bruton* does not apply in an interlocking confession situation, it should nonetheless not abandon the inquiry into whether the confessions genuinely interlock. Furthermore, where there is a significant difference between the two confessions, so that the codefendant's is uniquely damaging to the defendant's case, it should not matter that the prejudice results from a vast difference in the reliability of the confessions, rather than from the words contained in them.

In *Parker*, the plurality determined that the protection afforded by *Bruton* was of little value to a defendant "whose own admission of guilt stands before the jury unchallenged" and who "has corroborated his codefendant's statements by heaping blame onto himself." 442 U.S. at 73. Thus, where confessions were "interlocking," *id.* at 75, *Bruton* simply did not apply. The plurality made no attempt to delineate when codefendants' statements would interlock sufficiently to come within this exception, or indeed, whether they need interlock at all if the defendant has himself confessed. *Id.* at 79-80 (Blackmun, J., concurring). Similarly left open were questions as to how inculpatory a statement had to be before it qualified as a "confession," "extrajudicial admission of guilt," or a "statement[] . . . heaping blame onto [oneself]," or what constituted an "unchallenged" confession. *Id.* at 82 n.2 (Stevens, J., dissenting).

The Court's recent decision in *Lee* v. *Illinois*, 476 U.S. ___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), shed light on some of these questions. Although *Lee* did not involve a *Bruton* question, it did clarify when statements were similar enough in content so that they would be deemed mutually corroborative for Confrontation Clause purposes. The focus in *Lee* shifted from whether the defendant himself "confessed" to whether the codefendant's statement implicated the defendant significantly more than did the defendant's own statement. To comport with the Sixth Amendment, the Court held, those portions of the codefendant's statement which incriminate the defendant must be "thoroughly substantiated" by the defendant's own statement, and "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 54 U.S.L.W. at 4559-4560. In the same spirit, courts which have adopted the *Parker* plurality reasoning have nonetheless held that statements do not "interlock" where the codefendant's confession went further in implicating the defendant than did the defendant's own statement, *State* v. *Smith*, 117 Wis. 2d 399, 344 N.W.2d 711, 717 (1983), or where each confession attempts to shift the blame onto the other defendant. *State* v. *Robinson*, 622 S.W.2d 62 (Tenn. Cr. App. 1981).

If statements do not truly interlock where the significant differences in content affect the defendant's Confrontation Clause rights, so too should they not interlock if the prejudice is caused by significant differences in reliability, whether the difference in reliability gives rise to a substantial "challenge" to the voluntariness or truth of the defendant's confession, or to whether it was made at all. When a defendant's statement inculpates him less than does the codefendant's, the importance to the

defendant of an opportunity to confront the codefendant's statement is the same whether the difference in culpability rests in content or reliability. In both situations, the defendant has everything to gain by impeaching the codefendant's version since, if the jury disbelieves that version, the defendant's case stands to benefit.

The great difference in reliability that the confessions in this case were actually uttered (see discussion *ante* at pp. 27-29) was acknowledged by the State courts but deemed irrelevant to the Confrontation Clause question. This difference was in fact crucial, since it meant that the jury would naturally look to Benjamin's videotaped confession to resolve its doubts about petitioner's own alleged confession. Under such circumstances, Benjamin's videotaped confession was far more damaging to petitioner's case than his own, and rendered the People's case against him far more persuasive. Since it cannot be said that "[s]uccessfully impeaching [Benjamin's videotaped] confession on cross-examination would likely [have] yield[ed] small advantage to [petitioner]," *Parker* v. *Randolph*, 442 U.S. at 73, petitioner's alleged confession does not truly "interlock" with the one on videotape.

Since there is no genuine interlocking in this case, the only remaining question is whether the failure to sever was harmless error in light of the untainted admissible evidence against petitioner. As previously stated (*ante* at p. 26), there was no evidence proving petitioner's identity as one of the participants in the robbery/homicide except for his own alleged confession; moreover, the only evidence that the confession was made at all came from an unreliable witness with a motive to fabricate. Under such circumstances, the error cannot be considered harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

PHILIP L. WEINSTEIN*
ROBERT S. DEAN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorneys for Petitioner
**Counsel of Record*

Questions Presented

1. Whether at a joint criminal trial the State may, in substantial compliance with the Confrontation Clause, introduce against both defendants substantive evidence of both defendants' interlocking confessions to the crime when those confessions thoroughly substantiate each other, exhibit no significant discrepancies, and are convincingly corroborated by physical, forensic, and photographic evidence.

2. Whether the admission of both defendants' confessions, with proper limiting instructions, substantially complied with the Confrontation Clause where the confessions interlock as to the date of crime, the motive, the participants, the target, and the defendants' respective roles in it and where both defendants confessed to the same citizen who was cross-examined at trial, despite the fact that the codefendant repeated his confession in greater detail, in which he attempted to minimize petitioner's culpability, during a videotaped interview with an assistant district attorney.

3. Whether the admission of a codefendant's confession at a joint trial with proper limiting instructions, if error, was harmless beyond a reasonable doubt, where the defendant himself fully confessed his participation in the crime to his childhood friend, where the codefendant's confession did not incriminate the defendant to a greater degree than his own confession, and where the physical, photographic, forensic, and ballistic evidence introduced by the State at trial corroborated the defendant's confession in minute detail.

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No. 85-5939

IN THE

Supreme Court of the United States

October Term, 1986

EULOGIO CRUZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

Statement of the Case

Introduction

On the morning of November 29, 1981, Victoriano Agostini was gunned down in the South Bronx gas station where he worked as an attendant. Several hours later petitioner Eulogio Cruz (Chino) and his brother, Benjamin Cruz, arrived at the nearby apartment of their childhood friend, Norberto Cruz (no relation to petitioner and his codefendant Benjamin Cruz). Petitioner's arm bore a bloody bandage, and both petitioner and Benjamin informed Norberto Cruz that they had robbed a gas station in the 40th Precinct and shot the attendant.

In Norberto's words at trial, petitioner, with Benjamin standing at his side, said:

> That they had gone to give [sic] a hold up to a gas station and that he started struggling with him . . .
>
> He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station.

As recounted at trial, Benjamin then said:

> That he saw the man bend over, take out the gun and fire. He fired at Chino and then he jumped up and fired at the man in the gasoline station.
>
> Q. Well, just for clarification, who fired at Chino? Did he tell you that?
>
> A. Yes, the man at the gasoline station. (J.A. 33-34).*

Months later, during his investigation of the March 15, 1982 murder of Norberto's brother, Jerry Cruz, New York City Police Detective George Wood interviewed Norberto. During the course of their April 27th conversation, Norberto told the detective of petitioner's and Benjamin's visit on the morning of the gas station homicide. After hearing this information, Detective Wood continued his investigation into the death of Jerry Cruz, and on May 3, 1982, Detective Wood was informed that Benjamin Cruz had appeared at the 48th Precinct and wanted to talk to him about Jerry's death. Detective Wood drove to the 48th Precinct and then drove Benjamin Cruz back with him to the 45th Precinct.

There, with a New York City Police Officer acting as Spanish interpreter, Detective Wood began questioning

* Numerical references preceded by "J.A." are to the joint appendix; those preceded by "H." are to the minutes of the pre-trial suppression hearing, and those preceded by "T." are to the minutes of the second trial

Benjamin Cruz about Jerry's death, and Benjamin blurted out, "I shot a guy who shot my brother, Chino, at a gas station on 149th" (J.A. 30; T. 81-82). Benjamin Cruz was then advised of his *Miranda* rights, and Benjamin, later that morning, after another reading of the *Miranda* rights, made a twenty-two-minute videotaped confession to an assistant district attorney, in which he described, in greater detail, the circumstances under which his brother, petitioner, had been shot.

On June 11, 1982, petitioner Eulogio Cruz was accused by the Bronx County Grand Jury of, *inter alia*, having caused the death of Mr. Agostini during the commission of a robbery (J.A. 3-8).* On May 9, 1983, the charges pending against petitioner were consolidated for trial with those pending against his brother, Benjamin Cruz, who had also been indicted for the murder of Victoriano Agostini and related lesser crimes (J.A. 9-10).

The Pre-Trial Hearings and the First Trial

On May 25 through May 30, 1983, an evidentiary hearing was conducted in the Supreme Court of the State of New York, Bronx County, before The Honorable Fred Eggert, to determine the admissibility of Benjamin Cruz' videotaped confession to a Bronx County assistant district attorney (J.A. 61-69). Benjamin Cruz asserted before the hearing court that his confession to the murder of gas station attendant Victoriano Agostini was involuntary. Benjamin testified that he was not present during the robbery/homicide. Rather, he claimed that on the day of the crime, while he pretended to be asleep, he overheard petitioner talking to one Jerry Cruz about the crime (H. 81-85). Ben-

* Petitioner was indicted for two counts of Murder in the Second Degree—intentional murder and felony murder committed during the course of a robbery. Petitioner was ultimately convicted under the felony murder count of the indictment.

jamin claimed that despite petitioner's threat to keep quiet, he subsequently went to the police and confessed "so [he] wouldn't get his family involved in this" (H. 84). Benjamin quickly became confused on cross-examination. Unable to explain how he could make a twenty-two-minute detailed, videotaped confession based on his overhearing a one-minute conversation between his brother and Jerry Cruz, he stated that he confessed because he was nervous and "it just came out like that" (H. 101-04). Benjamin was also unable to explain why his brother allegedly threatened him, when, according to his direct testimony, he had pretended to be asleep during petitioner's conversation with Jerry Cruz (H. 98-99).

Following the denial of Benjamin's motion, petitioner moved to sever his trial from his brother's. In support of his application for a severance, petitioner argued that if his brother's confession were admitted at their joint trial and if Benjamin did not testify, he would be denied his right to confront his accusers. In response to petitioner's claim, the State argued that petitioner himself had confessed his participation in the Agostini murder to a private citizen, Norberto Cruz, and his confession fully interlocked with Benjamin's confession. Thus, the prosecutor contended, the rule announced in *Bruton* v. *United States*, 391 U.S. 123 (1968), would not be violated by a joint trial. The hearing court reserved decision on petitioner's motion for a severance (J.A. 14-17).

On June 7, 1983, petitioner and Benjamin Cruz proceeded, jointly, to trial. At this first trial, after Benjamin's videotaped confession was played for the jury, petitioner renewed his *Bruton* motion in the form of an application for a mistrial (J.A. 18). Justice Eggert denied petitioner's motion and, in a written decision rendered on June 10, 1983, the court held that the statements of petitioner and Benjamin Cruz "interlock fully as to the details of the crime and as to the full liability of each defendant for the crime charged" (J.A. 23, 26).

Petitioner's first trial ended when the trial court granted his motion for a mistrial due to juror misconduct (Minutes of June 14, 1983, pp. 3-4).

The Second Trial

On November 29, 1981, at 5:15 a.m., New York City Police Officers Dennis Fitzpatrick and Ronald Zuba were patrolling the 40th Precinct in Bronx County in their marked police vehicle when they received a radio transmission reporting a person injured (T. 35-36, 52-54). The two officers responded immediately to the Gaseteria service station on 149th Street and Prospect Avenue where they found the attendant, Victoriano Agostini, lying face down in a pool of blood, on the office floor (T. 36-37, 49). The police called for an ambulance, which took the mortally wounded attendant to a Bronx hospital where he died that day (T. 39-40, 58). Later that morning, at 8:00 a.m., detectives assigned to the New York City Police Department's Crime Scene Unit photographed the service station and searched for physical evidence (T. 180-83, 186-87).*

Less than five hours after the police discovered the grievously wounded Victoriano Agostini at the Gaseteria service station, petitioner and his brother appeared at the nearby apartment of Norberto Cruz (J.A. 32). Norberto, who was not related to petitioner or his codefendant brother, had been a friend of petitioner for twenty-five years and of the younger Benjamin Cruz for fifteen years, knowing both from their childhood in Puerto Rico (J.A.

* A series of photographs of the crime scene were introduced by the State at trial and have been submitted to the Clerk of this Court. The photographs reveal that Mr. Agostini had been lying on the floor behind a high counter in the service station's office.

31-32). Petitioner was visibly nervous and wore a bloodied bandage on his right arm (J.A. 32, 43).

When Norberto asked what had happened, petitioner, with his brother Benjamin Cruz standing beside him, stated that they had gone to hold up a gas station and that he became involved in a struggle with the attendant. Petitioner related that while he fought with the attendant, the latter bent down, pulled out a gun and fired. According to petitioner, his brother Benjamin then "jumped up" and shot the attendant (J.A. 33). Benjamin Cruz then told Norberto that he tried to "search" the attendant but that he "hadn't done it well" (J.A. 34). Benjamin stated that the attendant bent down, took out a gun, and fired at petitioner (J.A. 34). Benjamin told Norberto that at that point, he jumped up and shot the attendant (J.A. 34).*

When Benjamin completed his account of the shooting, Norberto offered to take petitioner to the hospital for treatment of his wound. Petitioner declined his friend's overture stating that, under the circumstances, a visit to the hospital would be too dangerous (J.A. 35). Petitioner and Benjamin then left the apartment with Jerry Cruz, Norberto's brother (J.A. 34, 41).

On the afternoon of the following day, Benjamin returned to Norberto's apartment, this time by himself (J.A. 36, 44). Benjamin told Norberto to clean the blood out of his car because it would be "very dangerous for Jerry" to leave his car in that condition (J.A. 36).**

The Forensic and Ballistic Evidence

On the same day that Benjamin Cruz came to Norberto's apartment to remove the blood from Jerry's car, an autopsy was performed on the body of Victoriano Agostini by Dr. John Pearl, an expert in forensic pathology (J.A. 52). The autopsy revealed that the deceased had received blunt force injuries on the bridge of his nose, around his eyes, and on his right cheek and left shoulder. In addition, Mr. Agostini had been shot twice in the head. One bullet grazed his head above the right ear and was fired from a distance of between three to six inches. The bullet, which followed a downward and backward path, never entered the deceased's skull. Rather, it split into fragments and exited Mr. Agostini's head one and one-half inches from its entry point. The second bullet entered the left front part of Mr. Agostini's head and also followed a downward and backward path through the brain, to the right rear part of the head (J.A. 52-53). The bullet and fragments were removed from the victim's head and sent to the police department's ballistics lab. The fatal bullet was determined to be .38 caliber and could have been fired from a .357 Magnum revolver (J.A. 54).

Four months later, the Agostini homicide investigation continues.

On March 14, 1982, Norberto Cruz' brother was killed (T. 146). Detective George Wood, who was investigating the Jerry Cruz homicide, met with Norberto on the day after his brother was killed and again on several subsequent occasions (T. 146, 164, 206-09). On April 27, 1982, Norberto informed the detective of petitioner's and Benjamin's visit on the day of Victoriano Agostini's death (J.A. 42; T. 146, 208-09).

Six days later, Detective Wood was contacted by petitioner's brother Benjamin (T. 210). While Detective Wood was speaking with Benjamin through an interpreter, Benjamin suddenly stated that he knew nothing about the

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* The trial court instructed the jury that Benjamin's statements were "to be taken into consideration only against Benjamin Cruz" (J.A. 34).

** The trial court, once again, instructed the jury that this statement was admissible only against Benjamin Cruz (J.A. 36).

Jerry Cruz homicide, but that he had shot a man who had fired at his brother, Chino, in a gas station on 149th Street (J.A. 30; T. 68-69, 80-81, 95). After the police read Benjamin his *Miranda* warnings he agreed to speak to an assistant district attorney, on videotape, concerning the Agostini homicide (T. 82-83, 197-98, 203-05).

Benjamin's videotaped confession*

After again waiving his *Miranda* rights (J.A. 62-63), twenty-two-year-old Benjamin admitted that in November of 1981, he, petitioner, Jerry Cruz and another individual went to rob a gas station (J.A. 63). Benjamin announced the holdup and, when the attendant resisted, petitioner hit him on the top of the nose with his gun and a struggle developed (J.A. 63). Benjamin stated that when the attendant produced a gun and shot petitioner in the arm, petitioner "shot him like to burn the clothes very close" (J.A. 68). Benjamin then "went over" petitioner's shoulder, pointed his .357 Magnum right between the eyes of his victim and "pow," "shot [the attendant] in the head and . . . killed him" (J.A. 64). After Benjamin shot the attendant, the victim fell backwards. Benjamin and petitioner then took $62.00 and fled in a car driven by Jerry Cruz (J.A. 65).

Benjamin refused to tell the assistant district attorney where petitioner was although he had just seen him on the previous Thursday (J.A. 66). Benjamin also professed ignorance when asked where his brother lived and where he "hangs out" (J.A. 66). Benjamin stated that petitioner did not seek medical attention for his wound and that "we bandaged him and took care of him" (J.A. 68).

* The videotape was introduced into evidence and was played for the jury. Justice Cerbone warned the jury that the confession was only to be considered against Benjamin Cruz (J.A. 30).

Summary of Argument and Introduction

Petitioner, convicted in a State court of felony murder for the shooting, by his codefendant brother, of a gas station attendant during the course of a robbery, seeks to overturn the judgment affirmed by the New York State Court of Appeals. Now, despite the fact that hours after the crime, he and his brother, Benjamin Cruz, confessed in substantively identical fashion, in each other's presence, to their childhood friend (evidence that the prosecution offered through the testimony of a single witness, Norberto Cruz) and despite the fact that, three months later, his brother blurted out the same confession to a police officer engaged in the investigation of an unrelated homicide in another precinct, petitioner claims he should be afforded a new trial because the State presented evidence that Benjamin voluntarily recounted the same substantively identical confession, in greater detail, on videotape to an assistant district attorney, and in its course attempted to minimize petitioner's culpability.

1. Though the argument was not specifically advanced in the State courts, the State, as Respondent, begins by asserting, in reliance on the Court's intervening decision in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed2d 514, 106 S. Ct. 2056 (1968) and on the record made in the State courts, that all the confessions were substantially admissible against all parties as interlocking extrajudicial confessions made under circumstances so marked with trustworthiness as to overcome the presumption of unreliability that attaches to most accomplice confessions.

Last term, in accordance with the rationale of *Ohio* v. *Roberts*, 448 U.S. 56 (1980) and *Dutton* v. *Evans*, 400 U.S. 74 (1974) (plurality decision), all of the then-sitting Justices of the Court agreed that an accomplice's extrajudicial

confession may be used as substantive evidence against a codefendant if the accomplice is unavailable and if his extrajudicial confession bears sufficient indicia of reliability, or such particularized guarantees of trustworthiness as to render it admissible in substantial compliance with the purpose of the Confrontation Clause. *Lee* v. *Illinois*, 90 L.Ed.2d at 525. The majority reasoned that, due to a special suspicion the law casts on the extrajudicial utterances of apprehended accomplices, an accomplice's confession is presumptively unreliable. *Lee* v. *Illinois*, 90 L.Ed:2d at 526. The Court held, however, that the presumption of unreliability could be rebutted. *Lee* v. *Illinois*, 90 L.Ed.2d at 526.

An application of the rationale of *Lee* to the facts of this case demonstrates that Benjamin Cruz' confessions were so marked with particularized guarantees of trustworthiness as to overcome the presumptively unreliable character of most accomplice confessions. In fact, petitioner himself steadfastly asserted throughout the State court appellate proceedings that there was "little doubt at all that [Benjamin's] videotape contained the truth" (Petitioner's brief to the New York Court of Appeals, p. 28). Although petitioner apparently has abandoned this argument before the Court, there are a multitude of factors attesting to the correctness of petitioner's position as articulated in the State courts.

First, an examination of the content of Benjamin's videotaped confession reveals that it thoroughly substantiated petitioner's own confession of guilt. Indeed, each statement, independently of the other, establishes all of the essential elements of New York's felony murder statute. While Benjamin's videotaped statement was longer and more detailed, it did not contradict or modify petitioner's statement in any significant way. *Lee* v. *Illinois*, 90 L.Ed.

2d at 529-530. Since Benjamin's description of petitioner's involvement was thoroughly substantiated by petitioner's own confession and any variances in detail were insignificant, *Lee* v. *Illinois*, 90 L.Ed.2d at 529, the two statements clearly interlock. Thus, Benjamin's confession must be deemed to be extremely reliable substantive evidence on this basis.

Additional indicia of the reliability of Benjamin's confession appear in the objective evidence introduced by the State at trial, and in the videotape itself. Indeed, the physical, forensic, photographic, and ballistic evidence further corroborates the accounts given in the various confessions in a manner which leaves no doubt that the confessions accurately recounted the events of the murder. Moreover, the videotape allowed the jury to view Benjamin's demeanor and hear his words as he confessed. Thus, by itself, it offered such reliable evidence of voluntariness and non-leading inquiry as to ensure that his confession was not prompted by interrogators who knew the details of the crime beforehand.

Similarly, the circumstances surrounding Benjamin's confessions attest to their reliability. Here, unlike the scenario in which Edwin Thomas made his confession inculpating Millie Lee, Benjamin had no reason to believe that petitioner (or Norberto Cruz, for that matter) had inculpated him in the felony murder; he had not been embraced, kissed and implored to honor his promise to share the "rap" with petitioner; and he did not confess to interrogators who knew the details they were looking for. To the contrary, Benjamin approached the police and volunteered to give information regarding a completely different homicide in a different precinct, and then in the course of the interview blurted out, "I shot a guy who shot my brother, Chino, in a gas station on 149th." This statement

in substance said no more than his previous confession in petitioner's presence to Norberto Cruz, and consequently it added nothing (other than a vague reference to a street address) to what Detective Wood already knew about that crime from his conversation with Norberto Cruz. Thus, after his initial admission, it cannot be said that Benjamin confessed to interrogators who knew the precise details they were looking for. Nor can petitioner successfully maintain that Benjamin's confessions exhibit the natural post-arrest motivation to shift the blame elsewhere which normally renders a codefendant's incriminating statements inevitably suspect. *Bruton* v. *United States*, 391 U.S. 123, 136 (1968).

In the first place, Benjamin made his initial spontaneous confession while playing the role of helpful citizen. He was not under arrest at the time: indeed, he was not even in custody. Secondly, after Benjamin was arrested and again voluntarily confessed on videotape, he did all that he could to minimize petitioner's role in the crime. As related by Benjamin, petitioner did no more than aid in the robbery and fire a missed shot in self defense, while Benjamin fired the fatal shot, "pow," right between the eyes, in defense of his brother. Since it is unlikely that Benjamin knew the intricacies of New York's felony murder statute, it is obvious that he implicated his brother in the homicide unwittingly. Indeed, during his videotaped confession, Benjamin consciously refrained from aiding in petitioner's apprehension by disclaiming knowledge of his whereabouts and recent movements. As his later hearing testimony graphically demonstrates, at the time Benjamin confessed to what he perceived to be a shooting in defense of his brother, he did not realize that it might be to his advantage to shift the blame to petitioner, as he did when he testified

after consultation with counsel who knew the scope of New York's felony murder statute.

Finally, a severance and a grant of immunity to Benjamin would not satisfactorily cure the confrontation problem here. Indeed, from the State's point of view, such a remedy would be completely inappropriate, for New York is a transactional immunity state. N.Y. Criminal Procedure Law §§ 50.10, 50.20 (McKinney 1981).* Thus, a severance to enable Benjamin to testify with immunity at petitioner's trial would exact as its societal price the complete immunization of the shooter from any liability for this murder. When the Court balances the scales in this case, the State submits that it should afford this factor compelling weight in deciding what measures a state should adopt to ensure an accused's right to confront his accusers.

Thus, the State asserts, the circumstances surrounding the codefendant's confessions in this case more than suffice in combined indicia of reliability to provide such particularized guarantees of trustworthiness as to render them substantively admissible against petitioner in substantial compliance with the Confrontation Clause. For these reasons, the State urges the Court to affirm this judgment upon the broader ground afforded by *Lee* v. *Illinois*, *supra*, a precedent announced after the trial and State court appeals in this case had concluded.

2. Should the Court choose not to affirm on the broader ground now offered by the State and addressed by petitioner in his brief at pp. 13, 16-17, 19-20, 31, that the con-

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* New York Criminal Procedure Law § 50.10 defines "immunity" as follows:

> 1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture.

fessions are substantively admissible interlocking extrajudicial confessions, the State asserts alternatively, the Court may affirm the judgment upon a finding that the confessions are "interlocking" within the rule of *Parker* v. *Randolph*, 442 U.S. 62 (1979).

The State asserts that when, as here, a defendant not only admits his guilt, but does so in a manner which thoroughly substantiates the confession of his accomplice as to all the elements of the crime charged and as to the participant's roles in its commission, the defendant will not be devastated by the possibility that a jury will fail to adhere to the trial court's limiting instructions and hence, that the exception to that rule articulated in *Bruton* should not apply in such cases. *Parker* v. *Randolph*, 442 U.S. at 73. Here, since petitioner's own interlocking confession of guilt, "the most probative and damaging evidence that can be admitted against him," *Bruton* v. *United States*, 391 U.S. at 139-40 (White, J. dissenting), was placed before the jury, the likelihood of a devastating spillover effect was eliminated. Therefore, there is no sound reason here for the Court to depart from the general rule that juries can be trusted to follow the trial court's clear limiting instructions. *Parker* v. *Randolph*, 442 U.S. at 75 n. 7; *Francis* v. *Franklin*, —— U.S. ——, 85 L.Ed.2d 344, 105 S. Ct. 1965 (1985).

Moreover, here the constitutional right of cross-examination would have little practical value for petitioner. *Parker* v. *Randolph*, 442 U.S. at 73. This conclusion flows both from the *Parker* plurality's observation that cross-examination is of less value to a defendant who, like petitioner, has confessed to the crime than to one who has consistently maintained his innocence, *Parker* v. *Randolph*, 442 U.S. at 72-73, and from the particular facts of this case. Here, not until the time of pretrial hearings did petitioner's

brother, Benjamin Cruz, realize that it would be in his interest to shift blame to petitioner. Thus, his hearing testimony, uttered one year subsequent to his videotaped confession and after having consulted with counsel, reveals that Benjamin now understood the scope of felony murder and could now predictably be expected to heap blame upon his brother. Under these circumstances it is clear that cross-examination of Benjamin at trial would only work to petitioner's disadvantage.

Nor should petitioner's argument that the difference in relative reliability between his confession to Norberto Cruz and Benjamin's confession on the videotape necessarily caused a spillover effect which overcame the limiting instructions be of sufficient weight to tip the scales in his favor. Though this record presents facts which are superficially similar to the hypothetical scenario posed by Justice Stevens in his dissent in *Parker* v. *Randolph*, 442 U.S. at 84-85, in fact the circumstances here are not nearly so dire as those posed by Justice Stevens, where X admitted to a drinking partner, a former cellmate, or a divorced spouse, that he had been with Y at the approximate time of the killing. In his brief, petitioner attempts to conform his case to the one posited by Justice Stevens' dissent, but in doing so, he blinks at the distinguishing factors that both his and his brother's confessions were recounted through the cross-examined testimony of a single witness, Norberto Cruz, and that Benjamin reconfessed in substantively identical fashion to the police, who were cross-examined at trial, before he finally recounted the same confession in more detail on the videotape. Moreover, there is absolutely no indication in the record before the Court that Norberto Cruz had a motive to "frame" petitioner. Similarly, petitioner is simply incorrect in his assertion that at the first trial Norberto Cruz stated that only Benjamin Cruz con-

fessed to the crime. The records of the first and second trial clearly reflect that Norberto had always maintained that petitioner and his brother confessed separately. In short, the record reveals that, contrary to petitioner's assertions, Norberto Cruz was a reliable witness who accurately recounted the substance of what the Cruz brothers had confessed to. Thus, unlike the situation where a presumably hostile witness vaguely recounts a single possibly incriminating circumstantial admission by one participant in a crime, here the Court confronts a case in which both participants confessed in each other's presence to a childhood friend having no obvious motive to bear them ill will and in doing so agreed on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how petitioner was injured and the gas station attendant was killed.

Here, the State asserts that the indicia of reliability and particularized guarantees of trustworthiness which adorn the confessions in this case offer such substantial compliance with the purpose of the Confrontation Clause that they more than suffice to render these confessions admissible, with limiting instructions, in one proceeding as "interlocking" extrajudicial confessions within the meaning of *Parker* v. *Randolph*, *supra*.

3. As its third alternative argument in support of the judgment before the Court, the State asserts in closing, that error, if any, in the admission of Benjamin's videotaped interlocking extrajudicial confession was harmless beyond a reasonable doubt. The State agrees with Justice Blackmun's assessment that in most interlocking confession cases, any error in admitting the confession of a non-testifying codefendant will be harmless beyond a reasonable doubt, *Parker* v. *Randolph*, 442 U.S. at 79 (Blackmun, J.,

concurring in part) and asserts that this case is no vehicle in which the Court should depart from that general rule.

Here the State rested its case primarily on petitioner's confession to Norberto Cruz, "probably the most probative and damaging evidence that can be admitted against him." *Bruton* v. *United States*, 391 U.S. 139-40 (White, J., dissenting). In Norberto's words the State demonstrated how, bleeding from the gunshot wound in his arm, petitioner nervously confessed that he had robbed a gas station attendant, became involved in a struggle, that the attendant had bent down and shot him, and that his brother had jumped up and shot the attendant. Norberto's testimony was corroborated by forensic, ballistic, and photographic evidence, all of which had neither the motive nor the capacity to lie, and which clearly demonstrated that the struggle and shooting in the gas station had occurred as petitioner recounted it to Norberto Cruz. On this evidence alone petitioner's guilt of felony murder was more than sufficiently established under New York law. *See, e.g.*, *People* v. *Lipsky*, 57 N.Y.2d 560, 443 N.E.2d 425 (1982); *People* v. *Davis*, 46 N.Y.2d 780, 386 N.E.2d 823 (1978). Finally, the State proved that, at least as to Benjamin's confession to him, Norberto Cruz was truthful because Benjamin recounted it in, as to him, substantially identical fashion to the police.

In sum, the State urges that the Court affirm the judgment of the New York State Court of Appeals in this case. Here, the confessions sufficiently interlock to be admissible as substantive evidence of guilt in substantial compliance with the Confrontation Clause; *a fortiori* they interlock sufficiently to be admissible in a joint trial with limiting instructions; and—stronger still—in view of the evidence at trial the Court can, with a clear conscience, rule beyond a reasonable doubt that the admission of the videotaped

confession, by itself, did not so skew the balance between the State's interest in effective, accurate, and efficient law enforcement and petitioner's right to confront his videotaped accuser that the integrity of the truth-finding process at this criminal trial was compromised to a constitutionally meaningful degree.

ARGUMENT

POINT

THE INTRODUCTION OF PETITIONER'S CODEFENDANT'S VIDEOTAPED CONFESSION AT THEIR JOINT TRIAL WITH INSTRUCTIONS THAT IT WAS ADMISSIBLE SOLELY AGAINST THE CODEFENDANT WAS IN SUBSTANTIAL COMPLIANCE WITH THE CONFRONTATION CLAUSE WHERE THE CODEFENDANT ASSUMED PRIMARY RESPONSIBILITY FOR THE HOMICIDE AND DID NOT ATTEMPT TO SHIFT BLAME ONTO PETITIONER, AND WHERE PETITIONER HIMSELF MADE A NEARLY IDENTICAL CONFESSION WHICH THOROUGHLY SUBSTANTIATED AND FULLY INTERLOCKED WITH THAT OF HIS CODEFENDANT AND WHICH WAS FULLY CONSISTENT WITH THE PHOTOGRAPHIC, FORENSIC AND BALLISTIC EVIDENCE (U.S. Const. Amendments XIV, VI; N.Y. Penal Law § 125.25 subd. [3]). .

A. The videotaped confession of petitioner's brother, codefendant Benjamin Cruz, was substantively admissible against petitioner pursuant to this Court's decisions in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986), and *Ohio* v. *Roberts*, 448 U.S. 56 (1980), since petitioner's brother was unavailable as a witness at trial, and his confession, in which he assumed primary responsibility for the homicide, was reliable.

For nearly a century, the Court has held that the primary mission of the Confrontation Clause is to advance

"the accuracy of the truth-determining process in criminal trials." *Tennessee* v. *Street*, 471 U.S. ——, 85 L.Ed. 2d 425, 105 S.Ct. 2078, 2082 (1985); *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Mattox* v. *United States*, 156 U.S. 237, 243 (1895). In striking a balance between the state's interest in effective law enforcement, legitimate correctional interests, and the development of precise rules of evidence, on the one hand, and the defendant's right to confront his accusers face-to-face, on the other, this Court has engaged in a pragmatic approach to a complex constitutional dilemma, ruling that when appropriate, an accused's right to confront, and thus cross-examine a particular witness must yield to the overriding need to ensure the integrity of the trial as the ultimate search for the truth. *New Mexico* v. *Earnest*, —— U.S. ——, 106 S.Ct. 2734, 54 U.S.L.W. 4868 (1986) (Rehnquist, J., concurring) (an accused's inability to conduct cross-examination of an accomplice does not necessarily render his statement inadmissible under the Confrontation Clause); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *California* v. *Green*, 399 U.S. 149 (1970). This case once again presents the Court with an opportunity to define the function of the Confrontation Clause and its scope in ensuring that only reliable evidence be admitted before the fact-finder.

Petitioner, who fully confessed his participation in the murder of a Bronx service station attendant to his life-long friend, Norberto Cruz, argues that the introduction of his codefendant's substantively indistinguishable confessions deprived him of his right to confront his accusers. Specifically, petitioner claims that the admission of his brother's videotaped confession deprived him of a favorable atmosphere in which the jury would have credited his assertion that he never confessed his guilt to Norberto Cruz. Thus, through misplaced reliance on the Confronta-

tion Clause, petitioner seeks to shield himself from extremely reliable evidence that would demonstrate the fallacious nature of his defense. *See Parker* v. *Randolph*, 442 U.S. 62, 73 (1980) (the Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a non-testifying declarant simply because it incriminates the defendant). This Court should refuse to countenance petitioner's attempt to rewrite the "mission" of the Confrontation Clause and warp the truth-determining process. *Tennessee* v. *Street*, 105 S. Ct. at 2082. Rather, the Court should hold that since petitioner's brother, Benjamin Cruz, was unavailable as a witness and because his confessions were inherently reliable and independently corroborated by the objective evidence introduced at trial, the Confrontation Clause permits their substantive admission against petitioner.*

Last term, in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986), all nine of the then-sitting Justices of the Court agreed that under the rationale of *Ohio*

* Although respondent did not argue, in the New York State courts, that Benjamin Cruz' statement was admissible against petitioner, this Court may nevertheless consider this issue since ". . . the prevailing party may defend a judgment on any ground which the law and the record permit . . ." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977); *see also Thigpen* v. *Roberts*, 468 U.S. 27, 82 L.Ed.2d 23, 104 S. Ct. 2916 (1984) (the Court may affirm on any ground that will not expand the relief granted below). Moreover, the issue of the admissibility of Benjamin Cruz' statement against petitioner is directly linked to petitioner's claim that the introduction of the statement violated this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). In light of the Government's concession in *Bruton*, the Court had no occasion to consider the admissibility of the codefendant's confession. *Bruton* v. *United States*, 391 U.S. at 128 n.3. Clearly, a finding that Benjamin Cruz' confession was substantively admissible against petitioner would necessarily defeat petitioner's *Bruton* claim. Therefore, since *Lee* v. *Illinois*, *supra*, had not been decided at the time of the State court proceedings, the Court should consider the State's argument, addressed by petitioner in his brief, that his codefendant's statement was admissible as an exception to the hearsay rule.

v. *Roberts*, 448 U.S. 56 (1980), an extrajudicial confession by an accomplice is admissible against a defendant if the accomplice is unavailable and if his statement bears sufficient indicia of reliability. *Lee* v. *Illinois*, 90 L.Ed.2d at 525. The majority reasoned, however, that due to the natural inclination of an accomplice to minimize his own criminal involvement and inculpate another, such admissions are presumptively unreliable. *Lee* v. *Illinois*, 90 L.Ed.2d at 526; *see Douglas* v. *Alabama*, 380 U.S. 415 (1965) (accomplice's confession which shifted blame onto the defendant is unreliable). While the Court in *Lee* held that the presumption of unreliability could be rebutted, it found that the statement of Lee's codefendant, Thomas, was demonstrably unreliable and therefore was inadmissible. In so holding, the Court rejected two separate arguments by the State in support of its position that Thomas' incriminating statements were admissible against Lee. First, the Court held that the "circumstances surrounding the confession" did not show such particularized guarantees of trustworthiness as would rebut the presumption of unreliability since Thomas' confession was motivated by a desire "to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders." *Lee* v. *Illinois*, 90 L.Ed.2d at 528.*

* The Court found not only that Thomas had a theoretical motive to inculpate Lee, "but that he was actively considering the possibility of becoming her adversary" by testifying for the State at her trial. *Lee* v. *Illinois*, 90 L.Ed.2d at 528. Thus, at the time he made his statement, Thomas, who was under arrest and in custody, was already attempting to minimize his involvement in the homicide. In contrast, Benjamin Cruz was not under arrest when he blurted out that he had killed the gas station attendant. It was only after he had already admitted the killing that Benjamin was arrested. Benjamin then made a full confession on videotape to an assistant district attorney in which he minimized petitioner's involvement and steadfastly refused to provide information regarding his brother's whereabouts. Clearly then, Benjamin Cruz was not attempting to shift blame to petitioner at the time he made these two confessions.

Additionally, the Court rejected the State's argument that Thomas' confession was reliable because it "interlocked" with Lee's own admission of guilt. The Court noted that the confessions were neither identical in all material respects nor truly interlocking since Thomas' statement inculpated Lee on the crucial issue of premeditation to a greater extent than did Lee's own confession. *Lee* v. *Illinois*, 90 L.Ed.2d at 529. In announcing the criteria for admissible interlocking extrajudicial confessions, the Court stated that:

> If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's involvement in the crime are not thoroughly substantiated by petitioner's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's statement may not be admitted.

Lee v. *Illinois*, 90 L.Ed.2d at 529. *See New Mexico* v. *Earnest, supra*, at n. (codefendant's admission may be shown to be reliable substantive evidence if it interlocks with the defendant's own confession).

An application of the rationale of *Lee* to the facts of the instant case demonstrates that Benjamin Cruz' confessions were extremely reliable. Indeed, petitioner himself has steadfastly maintained throughout the State court appellate proceedings that there was "little doubt at all that the videotape contained the truth" (Petitioner's brief to the New York Court of Appeals, p. 28). The State agrees with petitioner's position as articulated in the State courts. First, Benjamin Cruz' description of petitioner's involvement in the Agostini homicide was virtually identical in all

material respects to petitioner's own admission of guilt. Indeed, only hours after the shooting, petitioner and his brother appeared at the home of Norberto Cruz, a childhood friend from Puerto Rico (J.A. 32). Petitioner, visibly shaken and still wearing a blood-stained bandage on his arm, told his friend that he and his brother had just gone to rob a gas station and that he had become involved in a struggle with the attendant. Petitioner stated that the attendant bent down, pulled out a gun and fired at him, at which point his brother Benjamin "jumped up" and shot the attendant (J.A. 33). Then, as petitioner listened, his brother Benjamin gave Norberto a substantively identical account of the incident which petitioner did not contradict (J.A. 34). *See Lee* v. *Illinois*, 90 L.Ed.2d at 526 (a codefendant's confession is admissible against defendant where there are "circumstances indicating authorization or adoption"). Several months later, while being questioned by the police regarding an unrelated homicide, in a non-custodial setting, Benjamin spontaneously blurted out that he had shot a gas station attendant who had shot at his brother (J.A. 29-30). He then gave a full videotaped confession to an assistant district attorney admitting that in November of 1981, he and his brother went to rob a gas station; that his brother struggled with the attendant, hitting him on the nose with a gun and firing an errant shot very close to him; and that the attendant reached for a gun and shot petitioner in the arm (J.A. 63). Benjamin stated that he then "went over" his brother's shoulder and shot the attendant, killing him (J.A. 63-64).

A comparison of the two statements reveals that Benjamin's was, in all material respects, identical to petitioner's own confession. *Lee* v. *Illinois*, 90 L.Ed.2d at 535 (Blackmun, J., dissenting) (absolute identity in statements is not to be expected). Not only is there no doubt that the con-

fessions describe the same crime,* but each, independently of the other, established all of the essential elements of New York's felony murder statute. As the New York Court of Appeals aptly noted, the statements "agree on the date and target of the crime, the participants in it, the motive of robbery and the essential facts of how [petitioner] was injured and the gas station attendant killed" (J.A. 83). While Benjamin's videotaped statement was longer and more detailed (*i.e.* it stated the caliber of the guns used, the amount of money taken, and the number of perpetrators), it did not contradict or modify petitioner's statement in any significant way.** *Lee* v. *Illinois*, 90 L.Ed.2d at 529-30. Moreover, on the crucial issue of the role petitioner played in the homicide, Benjamin's statement mirrored his and petitioner's statement to Norberto Cruz. Since Benjamin Cruz' description of petitioner's involvement was "thoroughly substantiated" by petitioner's own confession in all material respects and any variances in detail were insignificant, *Lee* v. *Illinois*, 90 L.Ed.2d at 529, the two statements clearly interlock. Thus, Benjamin's confession must be deemed to be extremely reliable substantive evidence despite the lack of contemporaneous cross-examination. *New Mexico* v. *Earnest*, *supra*.

A multitude of factors attesting to the reliability of Benjamin's pre-hearing confessions to be found in the physical evidence underscores the validity of this conclusion. First, the photographic, ballistic, and forensic evidence introduced into evidence at trial extensively and convincingly corroborate the statements of petitioner and Benjamin Cruz with respect to the *modus operandi* of the crime.* For example, both petitioner and Benjamin Cruz described a violent struggle that developed between petitioner and the attendant when the latter resisted the robbery. The autopsy performed on the body of Victoriano Agostini disclosed that the deceased had suffered multiple abrasions on his face and shoulder which stood witness to this violent episode. Mr. Agostini had also received a laceration across the bridge of his nose, precisely the spot where, according to Benjamin's confession, petitioner had struck the victim with his gun (J.A. 52-53). Finally, the series of photographs introduced into evidence depicted the service station's office in disarray, confirming not only that a struggle took place, but that it occurred in precisely the area that both petitioner and his brother claimed.

Similarly, both petitioner and his brother stated that the attendant "bent down" to pull out a gun and that Ben-

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* The Second Circuit Court of Appeals has long held that the doctrine of interlocking confessions does not require identity in statements so long as it is clear that the statements describe the same criminal occurrence. *See e.g., Tamilio* v. *Fogg*, 713 F.2d 18 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041, 79 L.Ed.2d 170, 104 S.Ct. 706 (1984); *United States ex rel. Catanzaro* v. *Mancusi*, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

** Several courts applying the doctrine of interlocking confessions have observed that minor differences in detail are acceptable and even to be expected, so long as the statements interlock on the major elements of the crime charged. *See e.g. United States* v. *Paternina-Vergara*, 749 F.2d 993 (2d Cir. 1984); *cert. denied sub nom. Carter* v. *United States*, —— U.S. ——, 84 L.Ed.2d 342, 105 S. Ct. 197 (1985) (statements are interlocking despite minor differences in details of the crime); *United States* v. *Kroesser*, 731 F.2d 1509 (11th Cir. 1984) (mere fact that codefendant's statement was slightly more detailed [regarding the location of the stolen currency] does not mean that the confessions are not interlocking since location of the money was not an element of the crime charged); *Tamilio* v. *Fogg*, *supra* (to be interlocking, statements need not be identical as long as they coincide as to the major elements of the crime charged).

* Petitioner, himself, argued in the New York State appellate courts and, indeed, in his petition for a writ of certiorari that Benjamin's confession was extremely reliable and that there was "little doubt at all that the videotape contained the truth" (Petitioner's brief to the New York Court of Appeals, p. 28). In fact, petitioner, employing an analysis similar to that utilized by the State herein, viewed each piece of objective evidence introduced by the prosecution at trial and concluded that it corroborated Benjamin's videotaped confession (Petitioner's brief to the New York Court of Appeals, pp. 27-28). Petitioner has apparently abandoned this argument before this Court.

jamin had to "jump up" to fire at his victim (J.A. 33-35). Again, the post-mortem examination of Mr. Agostini's body confirmed both brothers' descriptions of the actual shooting. Dr. John Pearl testified at trial that the fatal bullet followed a "downward and backward" path through the skull and brain of the deceased (J.A. 52-53). This testimony firmly established that the bullet was indeed fired from above and also corroborated Benjamin's assertion that he fired into the front of his victim's head after aiming "right between his eyes" (J.A. 64). In addition, the photographs of the crime scene revealed that Mr. Agostini was discovered lying in a pool of blood behind a high counter located in the service station's office. This not only confirmed Benjamin's statement that the deceased had fallen backwards after being shot, but explained why Benjamin had to jump up to fire at his victim, who had crouched down behind the tall counter (J.A. 54).

Benjamin's assertion that he shot the deceased with a .357 Magnum was partially corroborated by the ballistics evidence. At trial a ballistics expert confirmed that the .38 caliber bullet removed from the deceased's head could have been fired from a .357 Magnum revolver (J.A. 64; T. 234-35). Finally, both brothers' statements that petitioner had been shot by the attendant and that he did not seek medical treatment, but was instead bandaged by Benjamin, were fully corroborated by Norberto Cruz, who observed petitioner wearing the bloody, make-shift bandage only hours after the crime and whose offer to take petitioner to the hospital was declined as it would be "very dangerous" (J.A. 32-33, 35). Clearly, the degree to which the confessions are corroborated by the objective evidence introduced at trial thoroughly substantiates the conclusion that Ben-

jamin's confessions were wholly reliable.*/** *See United States* v. *Smith*, —— F.2d ——, slip op. nos. 85-5532, 85-5538 (4th Cir. 1986) (codefendant's statement is deemed reliable since it was supported by other evidence); *United States* v. *Ward*, —— F.2d ——, slip op. nos. 85-1632, 85-1637 (3d Cir. 1986) (same).

The additional circumstances peculiarly attending Benjamin's videotaped confession independently add to its reliability. Unlike the presumptively unreliable accomplice situation addressed by this Court in *Lee*, where a defendant suddenly finding himself under arrest sought to shift blame onto his accomplice, no such "blame-it-on-the-other-person and buck-passing posturing" occurred in this case. *Lee* v. *Illinois*, 90 L.Ed.2d at 531 (Blackmun, J., dissenting). Here, in contrast to *Lee*, where Thomas actively considered becoming a witness against the defendant, Benjamin Cruz never entertained the thought of testifying against his brother at the time he confessed both before and shortly after he was arrested. Indeed, in an obvious display of fraternal loyalty, Benjamin, who had seen his brother only days prior to his confession, refused to disclose his where-

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* While petitioner concedes, as he must, that the *modus operandi* described in Benjamin's confession was consistent with the forensic and physical evidence, he nevertheless erroneously asserts that the confession is unreliable since "[n]o evidence other than petitioner's own confession corroborated Benjamin's videotaped claim that petitioner was a member of the holdup team" (petitioner's brief, p. 19-20). Obviously, this argument ignores the fact that the interlocking nature of the two confessions [*see ante* at 22-25] is a recognized *indicium* of their reliability and accuracy. *See New Mexico* v. *Earnest*, *supra*; *Lee* v. *Illinois*, 90 L.Ed.2d at 528; *Parker* v. *Randolph*, 442 U.S. at 72-73. Furthermore, this claim is plainly in error since, as already noted, months prior to Benjamin's videotaped confession, Norberto Cruz observed petitioner in a nervous state wearing the tell-tale bloodied bandage that unequivocally linked him to the homicide.

** The fact that this corroborative evidence introduced against petitioner and his codefendant was elicited from the same witnesses underscores the State's interest in trying both defendants together. *Lee* v. *Illinois*, 90 L.Ed.2d at 532 (Blackmun, J., dissenting).

abouts to the assistant district attorney, and even professed ignorance when asked where his brother lived (J.A. 65-66). It was only one year later, at the time of the pre-trial hearings, that Benjamin Cruz finally exhibited the buck-passing posturing expected "once partners in a crime recognize that the 'jig is up'." *Lee* v. *Illinois*, 90 L.Ed.2d at 528. Benjamin's belated attempt to minimize his involvement not only underscores the reliable nature of his prior statements, but clearly reduced the "practical value" of cross-examination at trial. *Parker* v. *Randolph*, 442 U.S. at 73. Since it had become obvious at the time of the pre-trial hearings that Benjamin, now represented by counsel, would testify that petitioner was solely responsible for the homicide, petitioner's claim that he was denied an opportunity to cross-examine his brother is a hollow one (*see* minutes of the pre-trial hearing, pp. 80-85, 88, 95-96, 98). In any event, as petitioner has conceded in the New York State courts, there was no doubt that Benjamin's videotaped confession was truthful.*

* Petitioner's concession that Benjamin's videotaped statement was truthful is supported by the content of Benjamin's subsequent hearing testimony which was fraught with inconsistencies and was inherently unbelievable. For example, Benjamin testified that on the day of the crime, he overheard a one-minute conversation between petitioner and Jerry Cruz, in which petitioner confessed to the crime (H. 81-85, 105). Benjamin could not explain how, based on this brief conversation, he was able to make his detailed twenty-two-minute videotaped confession (H. 104-05). Benjamin also testified that he had pretended to be asleep throughout the conversation and when his brother and Jerry Cruz left the apartment (H. 88-90). On cross-examination, however, he testified that he spoke with his brother, who allegedly warned him to keep silent (H. 97-99). Benjamin stated that after hearing the confession, he went to see his mother (H. 90-91). However, it had been established at the hearing that Benjamin's mother did not come to New York from Puerto Rico until 1982 (H. 91). Benjamin also accused his brother of killing Jerry Cruz on the day of the gas station robbery/homicide (H. 103). This was obviously false, since it was established at trial that Jerry was killed nearly four months later (T. 146). Finally, Benjamin stated that he made his videotaped confession because he was nervous and that "it just came out like that" (H. 101).

Notably, even the circumstances leading up to Benjamin's confession reveal that he was attempting to implicate only himself in the Agostini homicide. After all, Benjamin himself sought out the police to aid their investigation of Jerry Cruz' homicide and spontaneously blurted out that he had shot a gas station attendant who had shot at his brother (J.A. 30). The fact that Benjamin's arrest was initiated by his choice to confess to the homicide significantly diminishes the possibility that he was seeking to cast blame on anyone but himself and thus renders his confessions unambiguously adverse to his penal interest.* *Lee* v. *Illinois*, 90 L.Ed.2d at 534; *Dutton* v. *Evans*, 400 U.S. at 88-89 (spontaneous inculpatory statement is deemed to be reliable); *Chambers* v. *Mississippi*, 410 U.S. at 300 (spontaneity of statement is a factor attesting to its reliability). Indeed, Benjamin's videotaped confession, although technically one made by an accomplice, bears none of the traditional indicia of unreliability associated with such statements. Thus, Benjamin's confession would seem to be more akin to a statement against penal interest, *Dutton* v. *Evans*, 400 U.S. at 88-89, than an accomplice's confession. Therefore, since Benjamin's videotaped confession falls within "a firmly rooted hearsay exception" it must be deemed to be extremely reliable. *Ohio* v. *Roberts*, 448 U.S. at 66. *Cf. Lee* v. *Illinois*, 90 L.Ed.2d at 528 n.5.

Benjamin's statements to the police immediately prior to his full confession also demonstrate his subjective intent to claim sole responsibility for the killing. For example,

* Not only did Benjamin consciously refrain from shifting blame to his brother, but he likewise declined to blame any of the other perpetrators for the actual shooting of the attendant. If Benjamin had been of a mind to blame someone else, the obvious candidates would be Jerry Cruz, who had since died, or the perpetrator he referred to as "Pacho," who had returned to Puerto Rico (J.A. 66-67).

Benjamin boldly told the two detectives interviewing him that he would kill them if he had a gun (T. 88). Thus, Benjamin obviously wanted to project the real or pretended image of a callous killer—an appearance clearly discernible in his videotaped confession in which he casually demonstrates how he killed the gas station attendant by "shooting him right between the eyes." Benjamin's violent demonstration and remorseless and indifferent demeanor hardly bespeak a man who was interested in shifting blame to another.* To the contrary, any fair reading of the transcript of his confession or viewing of the videotape itself leads to the ironic conclusion that Benjamin was very much interested in ensuring that the authorities were aware that he was the killer who defended his brother. Thus, while it is true that Benjamin stated that his brother fired a shot at the attendant, he made sure that his audience knew that his brother's shot missed,** that it was fired in response to the attendant's own shot, and that it was he who fired the fatal bullet (J.A. 63-64).

Significantly, the nature of Benjamin Cruz' statement, when viewed against the backdrop of the crime itself, reveals that he never realized that he was incriminating his brother in a homicide. Indeed, from Benjamin's perspective, it was he who was admitting that he committed murder, albeit in defense of his brother, and he referred to his brother only incidentally as one of several other accomplices present for purposes of committing a robbery. Only through a working knowledge of New York's complex

* Significantly, because Benjamin's confession was recorded on videotape, the jury had an opportunity to judge his demeanor in order to determine whether his statement was worthy of belief. *See California* v. *Green*, 399 U.S. at 157-58; *Mattox* v. *United States*, 156 U.S. at 242-43.

** Benjamin was apparently mistaken in his belief that petitioner's shot missed the attendant and merely burned the attendant's clothes "very close" (J.A. 68), since the autopsy revealed that the deceased suffered a second, superficial gunshot wound to the head (J.A. 52-53).

felony murder statute [N.Y. Penal Law § 125.25 subd. 3] could Benjamin Cruz have known that, by providing the prosecution with evidence of petitioner's intent to commit robbery he, in effect, implicated his brother in the resulting homicide. Since it is unlikely that Benjamin Cruz knew of the underlying rationale for felony murder and its legal intricacies, it is apparent that he inculpated his brother unwittingly.

Another powerful *indicium* of the reliability of Benjamin Cruz' confessions to the police and the assistant district attorney, and perhaps the most striking aspect of the present case, is the joint admission of guilt by petitioner and his brother on the day of the homicide. Only hours after the crime, petitioner and his brother stood side by side as each, in turn, described their deed to Norberto Cruz.* Obviously, the fact that six months prior to his verbal indiscretion to the police and to his later formal confession of guilt to an assistant district attorney, Benjamin had given a nearly identical recitation of the facts of the crime is a powerful indication that his latter statements were accurate and reliable. More important, however, is the fact that Benjamin's earlier statement was made in petitioner's presence, following petitioner's own explanation of the facts of the crime. The fact that both petitioner and his brother gave identical versions of the criminal episode, with neither contradicting the other, reveals that they were in total agreement and that each brother expressly authorized or adopted the confession of the other. *Lee* v. *Illinois*, 90 L.Ed.2d at 526 (codefendant's statement is admissible

* Petitioner told Norberto that they went to hold up a gas station and that he struggled with the attendant, who bent down and fired a shot at him. Then, according to petitioner, Benjamin "jumped up" and shot the attendant. Benjamin then added that he failed to properly "search" the attendant. Benjamin agreed that when the attendant bent down and fired at his brother, he "jumped up" and shot the attendant (J.A. 33-34).

against defendant where the latter authorizes or adopts the statement); Fed. R. Evid. 801(d)(2)(B). Since petitioner had adopted his brother's original confession to Norberto Cruz as his own, and since Benjamin's initial confession merely mirrored his subsequent videotaped confession, petitioner had already adopted the substance of the latter statement. Thus, its admission at trial simply could not have violated the Confrontation Clause.*

Finally, petitioner's assertion that Benjamin Cruz was available as a witness at trial and that his statement was therefore inadmissible [petitioner's brief, p. 19 n.8], is not borne out by the record of the trial proceedings.** In fact,

* While petitioner might argue that silence, in the face of his brother's statement, is not sufficient for a finding of an adoption [*see e.g. Poole* v. *Perini*, 659 F.2d 730, 733 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982)], petitioner was far from silent. Indeed, petitioner arrived with his brother at Norberto's apartment still bleeding from the wound he had received hours earlier and then gave Norberto a full account of what he and his brother had done. The fact that Benjamin's statement was uttered moments after petitioner's is irrelevant since, when both confessions are viewed together, it is obvious that the brothers were in total agreement. *See United States* v. *DiGiovanni*, 544 F.2d 642, 648 (2d Cir. 1976) (testimony of cellmate of two defendants, relating a three-way conversation in which defendants described a bank robbery, consisted of express admissions and adoptive admissions); *United States* v. *Bolden*, 514 F.2d 1301, 1311 (D.C. Cir. 1975) (remarks made by defendants to each other about details of violent episode in which they had just been involved would have been admissible against each defendant as adoptive admissions); *United States* v. *Steel*, 458 F.2d 1164, 1166 (10th Cir. 1972) (under circumstances where it would be natural to contradict the declarant, silence can be inferred to be an adoption of the statement); *Wickliffe* v. *Duckworth*, 574 F. Supp. 979, 984 (N.D. Indiana 1983) (defendant adopted codefendant's statement that they had just committed a murder since defendant was present, heard the statements being made, and never denied or contradicted them).

** It is worth noting that this Court has not required a showing of unavailability in all cases involving Confrontation Clause analysis. *Ohio* v. *Roberts*, 448 U.S. at 65 n. 7; *Dutton* v. *Evans*, 400 U.S. 74 (1980) (accomplice's statement is admissible despite the State's failure to demonstrate the unavailability of the declarant). Recently, in *United States* v. *Inadi*, 475 U.S. ——, 89 L.Ed.2d 390, 106 S. Ct. 1121 (1986), the Court held that the Confrontation Clause does not

(footnote continued on next page)

petitioner's brother, through his trial counsel, expressly advised the trial court that he would not testify at trial (T. 104). Clearly, it was apparent to the trial court and to the attorneys involved that if called as a witness, Benjamin Cruz would invoke his Fifth Amendment right to remain silent.

Benjamin Cruz' certain reliance on the Fifth Amendment rendered him unavailable to the prosecution as well as to petitioner, *Lee* v. *Illinois*, 90 L.Ed.2d at 532 (Blackmun, J., dissenting), since, under New York State law, it is clear error to call a codefendant to the witness stand when the party is aware that the codefendant will merely assert his Fifth Amendment privilege before the jury. *People* v. *Owens*, 22 N.Y.2d 93, 293 N.E.2d 715 (1968). Therefore, since Benjamin Cruz had made known the fact that he would not testify at trial, the State could not, in good faith, call him as a witness to test the sincerity of his refusal. In short, Benjamin Cruz was not available to the prosecution as a witness against petitioner. Nor would a severance and a grant of immunity to Benjamin satisfactorily cure the confrontation problem here.* Indeed, from

require the prosecution to show that a nontestifying co-conspirator is unavailable to testify as a condition for admission of his out-of-court statement. *United States* v. *Inadi*, 89 L.Ed.2d at 397-99. Although it is respondent's position that the prosecution clearly established the unavailability of Benjamin Cruz, the rationale employed in *Inadi* would seem to indicate that a showing of unavailability is not necessary in the instant case. *See United States* v. *Inadi*, 89 L.Ed.2d at 398-99. *Cf. Lee* v. *Illinois*, 90 L.Ed.2d at 531 n. 2 (Blackmun, J., dissenting).

* While petitioner, citing *Kastigar* v. *United States*, 406 U.S. 441 (1972) [petitioner's brief, p. 19, n.8] seems to suggest that the State had an obligation to bestow immunity on his brother and therefore render him available, this Court has never placed such a costly burden on the prosecution. Indeed, several of the Circuit Court of Appeals have held that the government has no duty to grant immunity under these circumstances. *See United States* v. *Wright*, 588 F.2d 31, 37 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States* v. *Alessio*, 528 F.2d 1079 (9th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976).

the State's point of view, such a remedy would be completely inappropriate, for New York is, by State statute, solely a transactional immunity state. N.Y. Criminal Procedure Law §§ 50.10, 50.20 (McKinney 1981). Thus, a severance to enable Benjamin to testify with immunity at petitioner's trial would exact as its societal price the complete immunization of the shooter from any liability for this murder. When the Court balances the scales in this case, the State submits that it should afford this factor compelling weight in deciding what measures a state should adopt to ensure an accused's right to confront his accusers.

In sum, Benjamin Cruz' statements interlocked fully with petitioner's own admission of guilt and were virtually identical in all material respects. In addition, they bore substantial indicia of reliability in that Benjamin never attempted to shift blame onto his brother. The statements were also corroborated by the forensic, ballistic, and photographic evidence introduced at trial. Since Benjamin Cruz was unavailable as a witness, his statement was admissible against petitioner. *Ohio* v. *Roberts*, 448 U.S. at 65. Indeed, in view of the nature of Benjamin Cruz' confessions, it is clear that he intended to accept full responsibility for the Agostini murder. His statement coincided with petitioner's own damaging admission of guilt with respect to the elements of felony murder and it did not modify or contradict his brother's admission in any significant way.* In short, nothing in Benjamin's statement added to peti-

* *Cf. Marsh* v. *Richardson*, 781 F.2d 1201 (6th Cir. 1986), *cert. granted*, —— U.S. ——, 90 L.Ed.2d 976, 106 S. Ct. 1888 (1986) (codefendant's statements diverge on the element of intent); *Fuson* v. *Jago*, 773 F.2d 55 (6th Cir. 1985) (statement unreliable where product of custodial interrogation with declarant having a motive to inculpate the defendant); *United States* v. *Parker*, 622 F.2d 298 (8th Cir. 1980), *cert. denied sub nom., Ward* v. *United States*, 449 U.S. 851 (1980) (statements diverged on location of the crime which was an essential element of the crime charged); *Mayes* v. *Sowders*, 621 F.2d 850 (6th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980) (unreliable where codefendant's statement is obviously self-serving).

tioner's confession with respect to his role in the robbery/homicide. Clearly, then, under the facts of this case, the presumption of unreliability associated with an accomplice's confession, was soundly rebutted. *Lee* v. *Illinois*, 90 L.Ed.2d at 527-28; *New Mexico* v. *Earnest, supra*.

Accordingly, when the Court balances the dubious additional value that cross-examination of Benjamin Cruz would have added to the integrity of the truth-finding function at this trial against the obvious benefits that proceeding against both defendants in one forum affords to society as a whole, the State submits it should give greater weight to society's concerns here. Here, the overwhelming bulk of the evidence at trial was offered through witnesses, many of them experts, who were common to both defendants. Thus, proceeding in one trial allowed for greater speed in the adjudicatory process, to the benefit not only of the court personnel, attorneys, and witnesses but also to the many other defendants who are incarcerated awaiting trial and are waiting for speedy justice in their cases.

Thus, the State submits that in this trial the balance falls in favor of a ruling that Benjamin Cruz' confessions should be substantively admissible and it urges the Court to make that ruling.

B. The admission of petitioner's codefendant's confession was in accordance with this Court's decision in *Bruton* since petitioner confessed his guilt to an extremely reliable witness thus eliminating the devastating consequences of the jury's unlikely failure to adhere to the trial court's repeated limiting instructions.

At trial, New York State Supreme Court Justice Joseph Cerbone repeatedly cautioned the jury that Benjamin Cruz' confession could not be used as evidence against petitioner (J.A. 30-31, 34, 36, 59). Thus, even if the Court were to

determine, as an evidentiary matter, that Benjamin Cruz' interlocking confession was inadmissible against petitioner as substantive evidence, it should nevertheless conclude that the jury was fully capable of understanding and following the trial court's limiting instructions and that as a result, petitioner suffered no constitutional prejudice in the admission of his codefendant's interlocking confession at their joint trial. *Parker* v. *Randolph*, 442 U.S. 62 (1979). Indeed, since "the assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue," *Tennessee* v. *Street*, 85 L.Ed.2d at 431 n.6, the admission of Benjamin Cruz' confession, under the particular circumstances of this case, was in accordance with petitioner's Sixth and Fourteenth Amendment right to confront his accusers.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), on which petitioner primarily relies, this Court carved out an exception to the general rule that juries adhere to a trial court's instructions. Thus, the *Bruton* court held that, notwithstanding the trial court's clear limiting instructions, the admission at a joint trial of a codefendant's extrajudicial admission of guilt, which incriminated the non-confessing defendant, violated the latter's right to confront his accusers. *Bruton* v. *United States*, 391 U.S. at 135-36. In overruling its earlier decision in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), the Court held that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton v. *United States*, 391 U.S. at 135. Noting the "devastating" effect a codefendant's confession has on a non-confessing defendant and the "inevitably suspect" nature

of an accomplice's confession, the Court ruled that limiting instructions could not be counted upon to prevent the jury from considering the codefendant's hearsay statement as evidence against the defendant. *Id.**

Twelve years after *Bruton* was decided, the Court, in *Parker* v. *Randolph*, 442 U.S. 62 (1978), considered the question of whether *Bruton* requires reversal of a defendant's conviction "where the defendant himself has confessed and his confession 'interlocks' with and supports the confession of his codefendant." *Parker* v. *Randolph*, 442 U.S. at 64. A plurality of the Court ruled *Bruton* inapplicable to cases involving interlocking confessions since "the incriminating statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in *Bruton* when the incriminated defendant has admitted his guilt." *Parker* v. *Randolph*, 442 U.S. at 73. The plurality also observed that the constitutional right of cross-examination has less practical value to a defendant who has confessed than to one who has consistently maintained his innocence. *Id.* Finally, the plurality concluded that the "natural motivation to shift blame onto others" which renders accomplice's confessions "inevitably suspect," *Bruton* v. *United States*, 391 U.S. at 136, does not apply where the defendant has corroborated his codefend-

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* The Court expressly noted in *Bruton* that due to the Government's concession, the question of whether Evans' confession was inadmissible against *Bruton* under traditional hearsay rules was not properly before the Court. *Bruton* v. *United States*, 391 U.S. 128 n. 3. Thus, the *Bruton* decision rests in part on the Government's concession that the codefendant's statement was inadmissible. As already discussed [*ante* at 18-35], it is respondent's position that petitioner's codefendant's confession was admissible against petitioner. The fact that the trial court instructed the jury not to consider Benjamin Cruz' confession as evidence against petitioner does not alter this Court's capacity to consider the evidence introduced at trial and determine whether Benjamin's confession qualified for admissibility under an exception to the hearsay rule. Should the Court find Benjamin's confession admissible, the *Bruton* rule would not apply, irrespective of the trial court's limiting instructions which suggest otherwise.

ant's statements by "heaping blame onto himself." *Parker* v. *Randolph*, 442 U.S. at 73.

The Court should adopt the rationale of the *Parker* plurality here since it is consistent with the integrity of the fact-finding process which *Bruton* sought to protect and would help to provide trial courts with workable guidelines in their consideration of pre-trial severance motions.* As

* The practicality of the plurality's approach is, no doubt, the reason why the majority of the Circuit Court of Appeals have adopted an "interlocking confession doctrine". The Second, Fifth and Seventh Circuits had developed an interlocking confession exception to *Bruton* prior to this Court's decision in *Parker*. *See, e.g., Mack* v. *Maggio*, 538 F.2d 1129 (5th Cir. 1976); *United States* v. *Spinks*, 470 F.2d 64, 66 (7th Cir. 1972), *cert. denied*, 409 U.S. 1011 (1972); *United States ex rel. Catanzaro* v. *Mancusi, supra; see also Montes* v. *Jenkins*, 626 F.2d 584, 587 (7th Cir. 1980) (reaffirming reliance on interlocking confessions doctrine). The Fourth, Sixth and Eleventh Circuits have expressly adopted the *Parker* rationale. *See, e.g., United States* v. *Smith*, —— F.2d ——, slip op. nos. 85-5532, 85-5538 (4th Cir. 1986); *United States* v. *Marolla*, 766 F.2d 457, 460 (11th Cir. 1985); *Poole* v. *Perini, supra*. The Third, Eighth and Ninth Circuits have opted for a harmless error analysis. *See United States* v. *Ruff*, 717 F.2d 855 (3d Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984); *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 624 (9th Cir. 1980); *United States* v. *Parker, supra*.

Moreover, of the fourteen highest State courts that have considered the issue, nine have adopted the *Parker* plurality's rationale [*See State* v. *Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982); *Hays* v. *State*, 269 Ark. 47, 598 S.W.2d 91 (1980); *Washington* v. *United States*, 470 A.2d 729 (Dist. Col. App. 1983); *Fortner* v. *State*, 248 Ga. 107, 281 S.E.2d 533 (1981); *People* v. *Davis*, 97 Ill.2d 1, 452 N.E.2d 525 (1983); *State* v. *Bleyl*, 435 A.2d 1349, 1364-1365 (Me. 1981); *Commonwealth* v. *Bongarzone*, 390 Mass. 326, 455 N.E.2d 1183 (1983); *People* v. *Cruz*, 66 N.Y.2d 61, 70, 485 N.E.2d 221, 226 (1965); *People* v. *Smalls*, 55 N.Y.2d 407, 414-416, 434 N.E.2d 1063, 1066-1067 (1983); *State* v. *Thompson*, 279 S.C. 405, 308 S.E.2d 364, 365-366 (1983)]; three states have rejected the *per se* rationale of the plurality [*see Quick* v. *State*, 599 P.2d 712, 723-725 (Alaska 1979); *State* v. *Rodriguez*, 226 Kan. 558, 601 P.2d 686, 690 (1979); *State* v. *Moritz*, 63 Ohio St. 2d 150, 407 N.E.2d 1268, 1273 (1980)]; and two states have continued to adhere to their own criteria for determining whether *Bruton* error will result [*See State* v. *Haskell*, 100 N.J. 469, 495 A.2d 1341, 1346 (1985); *State* v. *Pacheco*, 481 A.2d 1009, 1018 (R.I. 1984)].

already noted, the State has a strong interest in trying codefendants together since such trials conserve State funds, allow for greater speed and consistency in the adjudicatory process, [*Standefer* v. *United States*, 447 U.S. 10, 25 (1980) (the fact that different juries may reach different results is "discomforting")], and reduce the strain on crime victims, witnesses, and court personnel. Clearly, adoption of the plurality's rationale in *Parker* would serve to further the State's interests in substantial compliance with the Confrontation Clause. Contrary to the position urged by petitioner [petitioner's brief, pp. 23-24 n.11], a harmless error analysis would not properly reconcile the competing interests at issue here. Indeed, such a rule would require trial courts to sever the trials of codefendants even where both have fully confessed their participation in the crime charged. Thus, the State contends that where two or more defendants make interlocking confessions, and therefore cannot be "devastated" by the admission of a codefendant's interlocking statement, there is no reason to sever their trials.

Although the *Parker* plurality did not specifically define the parameters of an "interlocking" confession, the doctrine was again considered by the Court last term in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S. Ct. 2056 (1986). In *Lee*, the concept of interlocking confessions was addressed in the more extreme context of substantive admissibility without limiting instructions. Thus, while the discussion in *Lee* is not necessarily applicable to a *Parker* situation, respondent suggests that the *Lee* decision sheds some light upon the meaning of an "interlocking confession" in the *Parker* context and addressed many of the concerns voiced in the concurrence and dissent in *Parker*. For example, Justice Blackmun's concern that "the two confessions may interlock in part only," "may cover only

a portion of the events in issue at trial'' or that one of the confessions ''may go far beyond the other in implicating the confessor's codefendant'', *Parker* v. *Randolph*, 442 U.S. at 79 (Blackmun, J., concurring), was directly addressed by the Court in *Lee*. Thus, under *Lee*'s discussion of substantively admissible ''interlocking'' statements, those statements that do not coincide on all material aspects of the crime or which diverge on the role of the participants in the crime, probably would not qualify as interlocking confessions for *Parker's* purposes. *Lee* v. *Illinois*, 90 L.Ed.2d at 528; *Parker* v. *Randolph*, 442 U.S. at 73. In much the same way, the two confessions envisioned by the *Parker* dissent in which defendant Y describes, in a television interview, how he and his codefendant X planned and executed the crime, while, in contrast, ''a drinking partner, a former cellmate, or a divorced spouse'' of codefendant X vaguely recalls X saying that he had been with Y at the approximate time of the killing, would not qualify as interlocking confessions under *Lee*. *Parker* v. *Randolph*, 442 U.S. at 84-85 (Stevens, J., dissenting). Whether interlocking extrajudicial confessions that meet the *Lee* standard, as the State submits the confessions in this case do, also meet the *Parker* v. *Randolph* standard for admissible interlocking extrajudicial confessions is the question presented by this case.

Clearly, where, as here, a defendant not only admits his guilt, but does so in a manner that thoroughly corresponds with the confession of his accomplice as to the essential elements of the crime, and as to the participants' roles in its commission, the defendant will not be devastated by the mere possibility that a jury will fail to adhere to the trial court's limiting instructions. *Parker* v. *Randolph*, 442 U.S. at 73. Indeed, as the *Lee* rationale demonstrates, the con-

fessions at issue here clearly interlock since Benjamin's confessions do not inculpate petitioner to a greater degree than his own confession of guilt, thus eliminating the likelihood of a devastating spillover effect. *Lee* v. *Illinois*, 90 L.Ed.2d at 529. Since the potential consequences of the jury's possible failure to adhere to the trial court's limiting instructions do not approach the situation addressed in *Bruton*, there is no reason for this Court to depart from the general rule that juries can be trusted to follow the trial court's instructions. *Parker* v. *Randolph*, 442 U.S. at 75, n. 7; *see Tennessee* v. *Street*, 471 U.S. ——, 85 L.Ed. 2d 425, 105 S. Ct. 2078 (1985) (jury is capable of following trial court's instruction that codefendant's confession, implicating respondent in the crime, is admissible only for rebuttal purposes); *Francis* v. *Franklin*, —— U.S. ——, 85 L.Ed.2d 344, 105 S. Ct. 1965 (1985) (''The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.'').

Clearly, the confessions at issue in this case interlock in their content [*ante* at 23-25]. Petitioner does not dispute this, but rather, claims that his confession to Norberto Cruz was inherently less reliable than his brother's videotaped confession to an assistant district attorney. Thus, petitioner erroneously concludes that the confessions do not fall within the interlocking exception to the *Bruton* rule. Petitioner is clearly incorrect.

As the New York Court of Appeals astutely observed, the statements at issue in this case were all extremely reliable (J.A. 84-85). Thus, while the relative reliability of codefendants' confessions might conceivably be a factor in determining whether confessions truly interlock, there is

no reason here for this Court to depart from established precedent and find petitioner's confession to be unreliable. Indeed, the fact that one defendant's confession is made to a cellmate or drinking partner, while the other defendant's statement is made to a police officer, does not automatically dictate a conclusion that the former is less reliable. *See Chambers* v. *Mississippi*, 410 U.S. 284 (1973) (statement made to a close friend shortly after the crime is deemed reliable); *Dutton* v. *Evans*, 400 U.S. 74 (1970) (statement to a cellmate is held to be reliable); *see also Tamilio* v. *Fogg*, *supra* (statement by codefendant to a fellow prisoner interlocks with the defendant's own admission). Thus, the State contends that the primary inquiry in a case of interlocking confessions should focus on the content of the statements. Such an analysis would, by its terms, take into account the relative reliability of each confession, since, as the Court has observed in *Lee* and *Parker*, confessions which truly interlock carry certain indicia of reliability. The question of whether the witness who relates the statement to the jury is reliable should ordinarily be left to the fact-finder who, having heard the witness testify subject to cross-examination, is best equipped to decide the issue of credibility. While the State acknowledges that there may be rare situations where a trial court is confronted with a witness so demonstrably biased or otherwise unreliable as to call into question the accuracy or veracity of the alleged statement as a matter of law thus warranting a severance, the instant case presents nothing that even approaches that extreme situation.

Petitioner's claim that his brother's confession nailed shut his coffin is a mere diversionary tack aimed at distorting the reliable nature of his own damning confession. Indeed, while petitioner labels his visit to Norberto Cruz a

"casual social call" [petitioner's brief, p. 28],* it is hard to imagine a confession more trustworthy than a joint one made to a life-long friend in the immediate aftermath of a violent criminal episode by two of the participants in the crime. Moreover, as discussed previously [*ante* at 25-27], petitioner's assertions that a struggle developed; that the attendant bent down; that he was shot by the attendant; and that his brother had to "jump up" to fire, were all corroborated by the ballistic, forensic, and photographic evidence introduced at trial.**

In contradistinction, there is simply nothing in the record to corroborate petitioner's claim that Norberto had a

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* As petitioner points out, the probable reason for petitioner's visit to Norberto's apartment was to see Norberto's brother, Jerry, who was one of the perpetrators of the crime [petitioner's brief, p. 28, n.8]. This fact was established independently of Benjamin Cruz' confession since Norberto testified that he did not tell the police about petitioner's statement until after Jerry died, because Jerry "had the event" (J.A. 45). Contrary to petitioner's claim, it was clear from this testimony and from petitioner's ensuing cross-examination, that Norberto remained silent because his brother was part of the robbery team (J.A. 45). Moreover, the fact that on the day of the crime, petitioner and his brother came to Norberto's apartment, waited for Jerry to get dressed, and then left with him, strongly suggests that Jerry was involved in the crime (J.A. 41). Indeed, Norberto's testimony that Jerry "never told me anything of what had happened," when viewed in context, necessarily implies that Jerry was present during the crime (J.A. 45).

** Petitioner's statement that he had been shot was corroborated by Norberto, who observed him wearing a blood-stained bandage on his arm (J.A. 32-33). While petitioner faults the prosecution for failing to further corroborate the fact that he had been shot, it must be remembered that petitioner declined his friend's offer to take him to the hospital (J.A. 35). Thus, the fact that no medical records were available merely corroborates Norberto's testimony that petitioner opted not to seek professional medical attention. Moreover, the fact that Norberto stated that petitioner wore a bandage on his right arm (J.A. 33), while Benjamin asserted that petitioner was shot in the left arm (J.A. 67), does not render Norberto's testimony less reliable. To the contrary, as the New York Court of Appeals succinctly observed, variations in human recall are to be expected and, ". . . as a practical matter the evidence of witnesses is usually more suspect if they harmonize too closely" (J.A. 83). *See Lee* v. *Illinois*, 90 L.Ed.2d at 535 (Blackmun, J., dissenting).

motive to "frame" him because he suspected that petitioner was involved in his brother's homicide [petitioner's brief, p. 27]. This argument was not only rejected by the jury at trial, but implicitly by the Appellate Division of the New York State Supreme Court, which silently affirmed petitioner's conviction, and explicitly by the New York Court of Appeals, which held that "[t]here is nothing in the record to support this claim" (J.A. 84). Clearly, the Court of Appeals was correct, since petitioner's entire argument is based on Norberto's statement that petitioner "tried to take me to the place where they killed my brother" (J.A. 46). This single ambiguous line of testimony simply does not support petitioner's claim that Norberto suspected him as one of his brother's killers. To the contrary, Norberto's statement reveals that he believed that some other "they" killed his brother and that petitioner, a close friend, was merely taking him to the place where it occurred.* Furthermore, when petitioner attempted to impute to Norberto this fallacious motive to lie, by directly inquiring: "You don't like Eulogio, do you?" petitioner's friend of twenty-five years, apparently not understanding why such an accusation would be made, simply replied: "Why not?" (J.A. 46). Thus, if petitioner was involved in the Jerry Cruz homicide, Norberto was certainly unaware of that fact.

Finally, petitioner's secondary attempt to demonstrate Norberto's alleged unreliability falls far short of any recognized legal standard. While petitioner claims that Norberto had a "prior record" [petitioner's brief, p. 27-28], the fact that the witness had an eight-year-old conviction for driving without a license (J.A. 36-37) surely does not

* At the first trial, Norberto expressly stated that he did not suspect that petitioner was involved in his brother's death (minutes of first trial, pp. 180, 185-86).

seriously undermine his credibility.* *See, e.g., Dutton* v. *Evans*, 400 U.S. 74 (1970).

In conclusion, since petitioner confessed his guilt to an extremely reliable citizen witness, and since that confession was thoroughly substantiated by the objective evidence introduced at trial, petitioner could not have been devastated by the speculative possibility that the jury would fail to adhere to the trial court's numerous limiting instructions.** Thus, the introduction of petitioner's codefendant's interlocking confession was in accordance with this Court's decision in *Bruton*. *Parker* v. *Randolph*, 442 U.S. 62 (1979). Accordingly, the State submits that the Court may affirm the judgment on this basis as well.

* While petitioner also faults Norberto for receiving welfare payments "even as he plied his trade on the street as a mechanic" [petitioner's brief, p. 27-28], it was never established, on cross-examination, that it is illegal for a welfare recipient to supplement his income. In fact the New York Social Services Law specifically provides that an individual may supplement his support payments by working and that the head of a family such as Norberto Cruz, could earn more than $500.00 per month and still be eligible for public assistance [N.Y. Social Services Law §§ 131, 131-a (McKinney 1983)].

Similarly without merit is petitioner's claim that at his first trial, Norberto attributed the only confession to Benjamin [petitioner's brief, p. 28]. Indeed, the record of the first trial unequivocally demonstrates that Norberto always maintained that petitioner and Benjamin confessed separately (*see* minutes of the first trial, pp. 149-53). Moreover, at the second trial, Norberto again denied that only Benjamin Cruz confessed (J.A. 50-51).

** Petitioner's claim that the prosecutor, on summation, urged the jury to look to Benjamin's videotaped confession to corroborate Norberto's testimony regarding petitioner's confession, is inaccurate (petitioner's brief, p. 29). Indeed, the prosecutor, responding to petitioner's attack on the credibility of Norberto Cruz, merely argued to the jury, that Benjamin's videotaped confession substantiated Norberto's version of Benjamin's earlier confession (J.A. 57). At no time did the prosecutor ask the jury to use the videotape to corroborate petitioner's confession to Norberto Cruz (J.A. 57-58).

C. Even if the admission of Benjamin Cruz' confession was error, it was harmless beyond a reasonable doubt.

Because a defendant is "the most knowledgeable and unimpeachable source of information about his past conduct," his own confession is "probably the most probative and damaging evidence that can be admitted against him." *Parker* v. *Randolph*, 442 U.S. 62, 72 (1978), *citing Bruton* v. *United States*, 391 U.S. at 139-40 (White, J., dissenting). In the case at bar, the prosecution laid before the jury the most powerful evidence of petitioner's guilt—his confession to his childhood friend Norberto Cruz. Petitioner, bleeding from the gunshot wound to his arm, appeared at his friend's apartment, which was in the vicinity of the crime scene, and nervously confessed his role in the murder of Victoriano Agostini. Petitioner admitted that he went to rob a gas station and that he became involved in a struggle with the attendant. He explained how the attendant bent down and shot him in the arm and told of his brother's act of jumping up and shooting the attendant. Standing alone, with nothing more than the dead body, this devastating admission was sufficient to prove that petitioner committed the crime of felony murder [N.Y. Penal Law § 125.25 subd. 3 (McKinney 1975)]. *See, e.g., People* v. *Lipsky*, 57 N.Y.2d 560, 443 N.E.2d 425 (1982); *People* v. *Davis*, 46 N.Y.2d 1780, 386 N.E.2d 823 (1978).

At trial, however, petitioner's confession did not stand alone. As already discussed in detail [*ante* at 25-27, 43], petitioner's statement was reinforced by the objective evidence at trial, so that any attempt to discredit or disclaim it would have to fail. Through the admission of forensic, ballistic, and photographic evidence it became clear to the jury that the struggle described by petitioner did in fact occur. The trajectory of the bullet wounds to the deceased's head confirmed that the attendant "bent down" and that Benjamin "jumped up" to shoot and kill Mr. Agostini. Even petitioner's statement that he had been shot was independently established through the cross-examined testimony of Norberto Cruz, a witness with no motive to falsely accuse petitioner. Clearly then, as was true in *Harrington* v. *California*, 395 U.S. 250, 254 (1969), unless this Court were to say that no violation of the *Bruton* rule could be harmless error, the judgment of the New York Court of Appeals must be affirmed. *See Schneble* v. *Florida*, 405 U.S. 427, 430 (1972) (introduction of codefendant's confession is harmless error where defendant's confession was consistent with the objective evidence and where the rope burns on his hands inextricably linked him to the homicide); *see also United States* v. *Coachman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (admission of codefendant's confession is harmless error where defendant's confession was corroborated by the physical evidence).

Against this backdrop, petitioner is hard-pressed to demonstrate exactly how he could have been prejudiced by the admission of his codefendant's confession, which merely mirrored his own. Thus, petitioner, unable to state with specificity what element of felony murder his brother's confession could have proven that his own confession did not, sees fit to argue, not that his confession was incomplete, but that the witness who reported it was unworthy of belief. However, as already discussed, petitioner's claim that Norberto Cruz had a motive to lie was supported by nothing more than petitioner's erroneous assertions—not a shred of evidence suggested that Norberto had a motive to falsely accuse petitioner.

Petitioner, again without discussing the substance of the respective confessions, argues that because his brother's confession was longer, the jury would naturally look to it to resolve its doubts about petitioner's confession. This

analysis is flawed for several reasons. First, it circumvents the most essential aspect of the Court's inquiry—whether Benjamin's confession materially altered petitioner's own account of his participation in the crime. On this crucial issue, petitioner is unable to demonstrate any significant difference between the two confessions.* True, Benjamin's confession was longer, but that was due in large part to the prosecutor's unsuccessful attempt to elicit information about the whereabouts of petitioner and the other members of the crime team. Benjamin's confession was also lengthier, since he provided extraneous details of the crime, completely unrelated to petitioner's involvement. Thus, petitioner could not have been prejudiced by the admission of his codefendant's confession since there was nothing in its content that the jury could look to that would strengthen the prosecutor's proof of petitioner's guilt. As Justice Blackmun has astutely noted, it is for this reason that "in most interlocking confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt." *Parker* v. *Randolph*, 442 U.S. at 79 (Blackmun, J., concurring). Surely, the present case is no exception to this rule.

Petitioner's claim of prejudice also rests on the faulty assumption that the jury would naturally have doubts about petitioner's confession and would therefore look to the purportedly more reliable videotape. Clearly, as respondent has stressed throughout, there is no sound reason to conclude that the jury would doubt petitioner's spontaneous outpouring of guilt in the presence of his codefendant to

* While Benjamin related that petitioner fired an errant shot at the attendant, this fact did not in any way supply additional proof of petitioner's guilt. Since petitioner was charged with felony murder, his intent to kill the attendant was a non-issue at trial. Thus, petitioner's admission that he intended to commit a robbery and that his brother shot the attendant, in conjunction with the physical, ballistic, and forensic evidence, was more than sufficient to establish his guilt.

his close friend and attach a greater degree of confidence in the custodial interrogation of petitioner's brother. To the contrary, this Court has, in various contexts, held that a confession of guilt to a friend or even a jailhouse associate can be the most powerful and reliable type of admission since it is motivated only by the defendant's desire to confess. *See Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Dutton* v. *Evans*, 400 U.S. 74 (1970). This is especially true here, since petitioner not only confessed himself, but tacitly acknowledged the truth of his brother's statement to Norberto Cruz by failing to contradict him. *United States* v. *Ruff*, *supra*. Under these circumstances, it is hard to imagine that the jury would attach a greater degree of reliability to Benjamin Cruz' confession, especially since Benjamin attacked the voluntariness of his confession at trial. While respondent agrees that Benjamin's argument that his confession was involuntary is as devoid of merit as petitioner's claim that he never confessed, the fact remains that there is no reason for this Court to assume that the jury would find Benjamin Cruz' confession more reliable than petitioner's own admission of guilt.

In sum, there is no doubt that petitioner's confession fully interlocked with that of his codefendant. *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986); *Parker* v. *Randolph*, 442 U.S. 62 (1979). Petitioner's confession, which was made to Norberto Cruz, an extremely reliable witness, provided more than sufficient proof that he committed the crime of felony murder. Petitioner's claim that Norberto suspected that petitioner was responsible for the death of his brother, Jerry, was properly rejected by the jury and by the New York State appellate courts, since there was no evidence in the record to support this fantasy. In fact, the record of both trials clearly establishes that, contrary to petitioner's reasoning,

Norberto never even entertained the notion that his childhood friend could be involved in that crime. Significantly, the objective evidence at trial corroborated petitioner's confession in minute detail and the circumstances surrounding its utterance only reinforced the reliable nature of the admission. Since Benjamin Cruz' interlocking confession could add nothing to this vast array of evidence and was, at most, merely cumulative [*Brown* v. *United States*, 411 U.S. 223, 231 (1972); *Harrington* v. *California*, 395 U.S. at 254], there was no "reasonable possibility" that Benjamin Cruz' confession contributed to petitioner's conviction. *Schneble* v. *Florida*, 405 U.S. at 423. Here, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of Benjamin Cruz' confession so insignificant by comparison, that it is clear beyond a reasonable doubt that the introduction of the codefendant's thoroughly substantiated, materially interlocking confession, if error at all, was harmless error. *Harrington* v. *California*, *supra*.

Accordingly, the State submits that the Court may affirm the judgment on this basis in addition to the others urged by respondent.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

MARIO MEROLA
District Attorney
Bronx County
215 East 161st Street
Bronx, New York 10451
(212) 590-2060

PETER D. CODDINGTON
LEE S. GAYER
Assistant District Attorneys
Of Counsel

August, 1986

No. 85-5939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals
Of The State Of New York

REPLY BRIEF FOR THE PETITIONER

PHILIP L. WEINSTEIN*
ROBERT S. DEAN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorneys for Petitioner
** Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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INTRODUCTION

Respondent's threshold argument is that this Court need not decide whether limiting instructions, that the nontestifying codefendant's videotaped confession was not admissible against petitioner, were adequate to protect petitioner's Confrontation Clause rights. The State asserts, instead, that this confession would have been *substantively* admissible against petitioner pursuant to this Court's recent decision in *Lee* v. *Illinois*, 476 U.S. ___, 106 S.Ct. 2056 (1986). In an *amicus* brief, the United States makes the same argument.

This Court should decline to follow this suggested disposition, as it was not presented to or passed upon by any of the state trial or appellate courts, and was not presented in respondent's opposition to the petition for certiorari. Nor, precisely because of respondent's failure to raise the question in the state courts, does this Court have an adequate factual record upon which to review this claim.

Even if this Court should decide to undertake the factual review of the entire record, including the codefendant's pretrial suppression hearing, that respondent suggests, the State has still not met its heavy burden, under *Lee*, of overcoming the videotape's presumptive unreliability as to petitioner's guilt. In fact, if the record portions to which respondent selectively cites are relevant at all, on fuller examination they contain indicia not of the videotape's reliability, but of its unreliability as evidence *connecting petitioner to the crime*.[1] These

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[1] In arguing the reliability of the videotaped confession as to petitioner's role in the crime, respondent relies heavily on petitioner's purported "concession" in his New York State Court of Appeals brief that the confession was "truthful" (Resp. Br., pp. 22, 25 n., 28). No such confession was made, respondent's highly selective quotation

sources also demonstrate precisely how petitioner could have made a meaningful assault on the codefendant's videotaped accusations, had he been given the opportunity to cross-examine him.

ARGUMENT

POINT I

RESPONDENT'S CLAIM, RAISED FOR THE FIRST TIME BEFORE THIS COURT, THAT THE CODEFENDANT'S VIDEOTAPED CONFESSION WAS SO RELIABLE AS TO BE ADMISSIBLE AS SUBSTANTIVE EVIDENCE AGAINST PETITIONER, IS NOT PROPERLY OR ADEQUATELY PRESENTED FOR THIS COURT'S REVIEW.

This Court has consistently applied the "not pressed or passed on" rule to bar the State, as respondent, from raising legal grounds to support a judgment where those grounds had not been presented to, passed on by, or adequately developed in, the state courts.

For example, in *Steagald* v. *United States*, 451 U.S. 204, 209 (1981), this Court refused to consider a "standing" claim proffered by the respondent government that had not been developed in the lower courts. Similarly, in

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notwithstanding. Petitioner did argue in that brief, as he does before this Court, that, in contrast to the sparse detail contained in petitioner's alleged confession, the codefendant's videotaped confession contained details remarkably consistent with the physical evidence at the scene. Thus, it would have "seemed" to the jury (Petitioner's Brief to the New York Court of Appeals, p. 28) that the videotape contained the truth. That is precisely the prejudice suffered by petitioner in this case. For while the videotaped confession contained self-verifying details as to *modus operandi*, it contained no such indicia of reliability of its assertion that petitioner was present at the scene of the crime (*Id.* at 19). Yet the jury was likely to have used that confession in weighing petitioner's connection to the crime, limiting instructions notwithstanding.

Hayes v. *Florida*, 470 U.S. ___, 105 S. Ct. 1643, 1646 n.1 (1985), the Court declined to reach the respondent State's "inevitable discovery" argument, as it was never raised in the state courts. As in those cases, this Court should decline to address the issue which respondent seeks now to inject into this case for the first time.

Aside from general federalism concerns, *see, e.g.*, *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983), this result is required here because "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969); *see also Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978).

Having foregone the heavy burden in the state courts of demonstrating the videotape's reliability as evidence connecting petitioner to the crime, respondent attempts to meet that burden now by gleaning selected portions of the proceedings below, including facts which were adduced only at the codefendant's suppression hearing and never came before the judge or jury that convicted petitioner. Most significantly, petitioner's trial attorney had neither reason nor opportunity to elicit or marshal the evidence to rebut respondent's belated claim of reliability, since the admissibility or reliability of the videotape as evidence *connecting petitioner to the crime* was never then at issue.

The procedural posture of this case is thus distinguishable from that in *Lee* v. *Illinois*, 106 S. Ct. at 2056, and *New Mexico* v. *Earnest*, 476 U.S. ___, 106 S. Ct. 2734 (1986). In both cases, the codefendant's confession had been used as substantive evidence in the state trial court to convict the defendant. Accordingly, the question in state court, and hence the question reviewed by this Court, was whether this use was consistent with the Confrontation

Clause. *Lee*, 106 S. Ct. at 2061; *see State* v. *Earnest*, 103 N.M. 95, 703 P.2d 872, 875-876 (1985). In petitioner's case, the admissibility of the videotape as substantive evidence against petitioner has not been put in issue until now.

Petitioner, in reliance on respondent's position in the trial court, had no opportunity to help frame or contribute to the record on this issue. Moreover, because respondent similarly failed to advance its current position throughout the state appellate process, the state courts have had no opportunity to pass upon the question as a matter of state law.[2] Thus, as respondent's failure to raise the claim throughout the state courts deprived petitioner of the opportunity to develop the record or to assert potentially dispositive state procedural bars, it would be manifestly unfair to petitioner to determine, at this late stage, respondent's claim.

POINT II

THE EXISTING RECORD DOES NOT SUPPORT RESPONDENT'S CLAIM THAT THE VIDEOTAPED CONFESSION BEARS SPECIAL INDICIA OF RELIABILITY AS EVIDENCE CONNECTING PETITIONER TO THE CRIME.

Respondent urges that the record is clear that the codefendant's videotaped accusations against petitioner bear special indicia of reliability. Should this Court enter-

[2] For example, had respondent pressed the claim in either state appellate court, it would have been disposed of on state procedural grounds, *i.e.*, forfeiture due to respondent's failure to raise the claim in trial court. *See, e.g., People* v. *Nieves*, 67 N.Y.2d 125, 135-136, 492 N.E.2d 109, 115-116 (1986). Such a procedural bar would then have constituted an adequate and independent state ground barring review by this Court. *See Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978).

tain this belated claim, petitioner contends that even the existing record fails to support respondent's contention; in fact, the record strongly suggests that petitioner could have marshalled a convincing argument at the trial level, had he reason or opportunity to do so, that the videotape was not sufficiently reliable evidence connecting him to the crime.

A. Respondent Incorrectly Claims That The Videotaped Confession Would Have Been Admissible Against Petitioner Under A "Firmly Rooted Hearsay Exception": Declarations Against Penal Interest.

Respondent argues that the codefendant's videotaped confession was independently admissible against petitioner under a "firmly rooted hearsay exception"—declarations against penal interest—and that such admissibility eliminates any Confrontation Clause concerns (Resp. Br. p. 29; *Amicus* Br. p. 13). The *Lee* Court, deeming such declarations "too large a class for meaningful Confrontation Clause analysis," rejected this very argument. 106 S. Ct. at 2064 n.5. This judgment was eminently correct.

Furthermore, whether the codefendant's videotaped accusations connecting petitioner to the crime were admissible as "declarations against penal interest" is a question of New York State evidentiary law, and New York's declaration against penal interest doctrine would have barred the codefendant's videotaped accusations against petitioner from evidence against him. Respondent's failure to cite any New York cases to support its current claim of admissibility is understandable: New York imposes at least two separate obstacles to admissibility, under its version of the hearsay exception, that are apparently not contained in (for example) the

federal rule upon which the government so strenuously relies in its *amicus* brief.

First, under New York law, extra safeguards have been imposed where an accomplice's confession pursuant to police interrogation is sought to be admitted against the defendant as a declaration against penal interest. In *People* v. *Geoghegan*, 51 N.Y.2d 45, 409 N.E.2d 975 (1980), the Court of Appeals held that, before such declarations can be admissible against a criminal defendant, the State has to prove not only that the declarations were against penal interest, but also that the declarant was not on notice as to the benefits of falsifying. Unless the State could show that the accomplice did not cooperate with the police or have any motive to gain their favor, courts are to presume that the declarant was motivated by a desire to gain leniency.[3] Based on this holding, at least one New York commentator has observed:

> Although the Court of Appeals has not mandated exclusion of all inculpatory declarations against penal interest made by accomplices in the atmosphere of police interrogation, clearly few, if any, declarations could pass the strict standards imposed in *Geoghegan*.

Goodman, *Hearsay Rule for Declarations Against One's Penal Interest*, N.Y.L.J., Aug. 12, 1981, at p. 1, cols. 2-3, p.2, cols. 1-6, p. 3, col. 1. Since the codefendant in this case was cooperating with the police at the time he made the videotaped confession, the videotape's admission against petitioner would have been barred under *Geoghegan*.

The second hurdle imposed by New York law, where a declaration against penal interest is sought to be intro-

[3] In so holding, the *Geoghegan* majority rejected the dissent's reasoning that the accomplice's confession was so reliable as to be admissible pursuant to *Ohio* v. *Roberts*, 448 U.S. 56 (1980). 51 N.Y.2d at 52; 409 N.E.2d at 978.

duced against a criminal defendant, is that only the *self*-incriminatory portions of the declaration are admissible; all references to the defendant's involvement are inadmissible. Thus, if A makes a declaration against penal interest that A and B committed murder, that portion of A's declaration which mentions B must be deleted. *People* v. *Geoghegan*, 51 N.Y.2d at 49, 409 N.E.2d at 976; *People* v. *Maerling*, 46 N.Y.2d 289, 298, 385 N.E.2d 1245, 1250 (1978); *People* v. *Josan*, 92 A.D.2d 902, 459 N.Y.S.2d 897 (N.Y. App. Div., 2d Dept. 1983). Prince, *Richardson On Evidence*, § 260 (10th ed.) (Cumulative Supp. 1972-1985, p. 115). Thus, under this rule, those portions of the videotape which placed petitioner at the scene of the homicide would have to have been deleted prior to any admission of it as a declaration against penal interest.

Therefore, even assuming the codefendant's videotaped confession was against what he knew at the time to be his penal interest (but see pp. 8-11, *post*), the videotape's accusations against petitioner were inadmissible under New York's own "firmly rooted" declaration against penal interest doctrine. If any further evidence of this is needed, it lies in respondent's decision not to offer them into evidence under that theory at petitioner's trial.[4]

[4] An additional requirement under New York law is that the criminal defendant be allowed to elicit the entire circumstances under which the declaration was made in order to show that the "criteria for admission" under the declaration against penal interest doctrine are "illusory" in his particular case. *People* v. *Maerling*, 46 N.Y.2d at 298-299, 385 N.E.2d at 1251. Petitioner had no such opportunity, since respondent did not offer the videotape into evidence against him. Under New York's rules of appellate procedure, therefore, petitioner's judgment could not be affirmed on appeal on the ground that it was a declaration against penal interest, since it was not admitted as such in trial court. *People* v. *Nieves*, 67 N.Y.2d 125, 135-136, 492 N.E.2d 109, 115-116 (1986). Since respondent would have been barred procedurally from raising this issue in the New York

Therefore, respondent's bald assertion that the videotape "must be deemed to be extremely reliable" evidence against petitioner since it "falls within 'a firmly rooted hearsay exception'" (Resp. Br. p. 29), is a singularly hollow one.

B. Respondent's Claim That The Videotaped Confession Was Inherently Reliable As Evidence Of Petitioner's Guilt Is Not Supported By The Record.

Respondent claims that the codefendant's videotaped confession was "inherently reliable" (Resp. Br. p. 20) as evidence of petitioner's involvement in the crime, since it heaped blame upon its declarant and, in a display of "fraternal loyalty" (Resp. Br. p. 27), sought to minimize petitioner's guilt. A close examination of the minutes of the codefendant's suppression hearing, to which respondent has selectively cited in making its argument, actually displays the codefendant Benjamin in a misguided, and

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appellate courts, this Court should also not review it. *See Michigan* v. *Tyler*, 436 U.S., 512 n.7 (1978).

Furthermore, the issue of whether Benjamin was "unavailable" as a witness for the purposes of New York's "penal interest" exception was never litigated in the state courts. The People never called Benjamin to the stand, outside the jury's presence, to determine if Benjamin would refuse to testify. New York courts consider a witness unavailable for the purposes of this hearsay exception when he refuses to testify *when called to the stand*, *e.g.*, *People* v. *Settles*, 46 N.Y.2d 154, 167, 385 N.E.2d 612, 619 (1978); *People* v. *Brown*, 26 N.Y.2d 88, 91, 257 N.E.2d 16, 17 (1970); however, whether New York would deem a codefendant unavailable pursuant to this hearsay exception where he did not assert his Fifth Amendment privilege on the witness stand, but probably would have done so had he been called, is still an open question. Respondent's failure to litigate this availability question at the trial level has deprived the state appellate courts the opportunity to rule on it *as a matter of state law*.

increasingly self-defeating attempt to shift blame away from himself.

At the hearing, Detective Wood testified that the Cruz brothers (Eulogio, Benjamin, and two other brothers) became "suspects" in the Jerry Cruz homicide (H. 15, 18).[5] Additionally, Wood learned from Jerry Cruz's brother, Norberto, that Benjamin, Eulogio, and two others (Chevy Figueroa and Elliot Perez)[6] were involved in the instant gas station robbery/homicide (H. 19, 21-22). Wood passed out business cards to people in the area and spread the word that he wanted to speak to Benjamin about the Jerry Cruz homicide (H. 17).

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[5] Numbers preceded by "H" refer to the pages of the codefendant's pretrial hearing, dated May 25, 1983.

[6] The *dramatis personae* contained in Norberto's statement to the police contrasts with the one contained in Benjamin's videotaped confession. Benjamin reported in that confession that he, Eulogio, "Pacho" and Jerry Cruz were involved (J.A. 65-66). Norberto apparently omitted his brother's name from the list and added one or two others. Obviously, either or both of these two "witnesses," whom respondent claims to be reliable, lied in these statements to the police about who was present at the robbery.

Even more significantly, the delayed timing of Norberto's decision to "tell all" to Detective Wood strongly suggests that it was based upon a desire for revenge against Eulogio and Benjamin for their role in Jerry's death, which role was so notorious that even the police knew about it. If, as respondent argues, Norberto "never even entertained the notion that his childhood friend could be involved in" Jerry's death (Resp. Br. pp. 49-50), then he was the only person in the Bronx who had not "entertained" that notion. Since Norberto kept Jerry's involvement in the robbery from Detective Wood even after Jerry's death, Norberto's sudden decision to turn in petitioner after Jerry's death could not have been spurred by the realization that he no longer had to protect his dead brother from police involvement: Norberto continued to protect Jerry even after Jerry's death.

Benjamin's later confession to the robbery/homicide was not then "spontaneously blurted out" (Resp. Br. p. 29) in an attempt to aid the police. Rather, as the government points out (*Amicus* Br. pp. 4 n.6, 14), Benjamin told the police about the robbery/homicide in a desperate effort to get himself off the hook for the Jerry Cruz homicide. To convince Wood that he was not the type of person to deny killing a man if he had done so, he bragged that he had killed a gas station attendant who had shot his brother (H. 7). Only when Wood then gave Benjamin his *Miranda* warnings for the robbery/homicide did Benjamin—who had no prior familiarity with the law (H. 75) and the mentality of a 5-year-old child (H. 66)—realize that his attempt to exculpate himself from the Jerry Cruz homicide had inculpated him in another case. He then became angry, wanted to go home, and told both police officers that he would shoot them if he could (H. 10, 31).

Benjamin later confessed on videotape to the robbery/homicide and named petitioner as one of the holdup team. Respondent argues that his naming of petitioner was reliable because Benjamin, in a display of "fraternal loyalty," heaped all the blame on himself. Respondent also speculates that Benjamin was unaware of the intricacies of the felony murder statute and therefore inculpated his brother only unwittingly (Resp. Br. pp. 30-31). As respondent also concedes, however, Benjamin's version of events showed that he acted solely "in defense of his brother" (Resp. Br. p. 30). And, if, as respondent claims, Benjamin was not familiar with New York's felony murder law, then he also did not know that self-defense is not a defense to felony murder. Thus, rather than realizing that he was heaping all the blame on himself, Benjamin obviously thought at the time that he was exculpating himself by way of self-defense, and inculpating his

brother, who, as he was quick to accuse, had demanded the money, threatened the attendant, assaulted the attendant, and fired the first shot at him—all in furtherance of a robbery and not in self-defense (J.A. 63-67).[7]

In sum, the hearing evidence injected into this appeal by respondent actually supports the view that Benjamin's videotaped confession was the culmination of his slow-witted attempts to convince the police that he was innocent of the Jerry Cruz murder. Benjamin did not realize that his confession was against penal interest when he made it. It was not until much later that Benjamin would realize that his attempts at self-exculpation were illusory, that he had unwittingly heaped blame on himself.

Furthermore, once Benjamin realized that his statements to the police had not exculpated him, he then, at the hearing, redoubled his efforts to save himself at petitioner's expense. He testified that his videotaped confession was a lie; that he, Benjamin, had no part in the crime; that he learned of the crime from petitioner, who *was* one of the robbers; that petitioner had threatened him to keep quiet; and that petitioner had killed Jerry Cruz (H. 81-84, 97-98, 105). This testimony gives the crowning blow to any assertion that Benjamin felt "fraternal loyalty" toward petitioner.

Moreover, this evidence of Benjamin's motivation to cast blame on petitioner came out at the hearing despite

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[7] It is also worth noting that the police had already been advised, by Norberto, of petitioner's alleged involvement in the robbery/homicide, so that Benjamin's inclusion of petitioner in his version could very well have been a slow-witted attempt to curry favor. Indeed, the videotape reveals that it was the assistant district attorney who first brought up petitioner's name ("Chino") during that confession (J.A. 62).

the fact that petitioner's counsel took no part in it. He took no part because that motivation was then irrelevant to his case, as the resultant videotaped confession was not being offered as evidence against his client; the hearing was addressed solely to the unrelated question of the voluntariness of that confession. Had counsel had reason or opportunity to do so, he might very well have explored and clarified that motivation further, as well as other factors belying the reliability of Benjamin's accusations against petitioner, at the hearing level, so that the court could make an evidentiary ruling on a full record.[8] If Benjamin's confession were deemed admissible as substantive evidence against petitioner, then counsel could have put before the jury (*see Crane* v. *Kentucky*, 476 U.S. ___, 106 S. Ct. 2142 (1986)) the evidence that came out at the hearing tending to show that Benjamin inculpated petitioner in an effort to exculpate himself from the Jerry Cruz homicide.[9]

Thus, even the limited record developed for unrelated reasons, without counsel's participation, cannot overcome the heavy presumption of unreliability, set forth in *Lee* v. *Illinois*, 106 S. Ct. at 2056, of Benjamin's confession as evidence connecting petitioner to the crime.

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[8] The incompleteness of the record as to Benjamin's motives in inculpating petitioner distinguishes this case from *Lee* v. *Illinois*, 106 S. Ct. at 2056, where Lee's codefendant's motives to shift blame to Lee were explored on the record. *See id.* at 2064.

[9] The jury also never heard that Benjamin and Norberto gave two different sets of *dramatis personae* to the police, and that Norberto must have known that petitioner was a suspect in the Jerry Cruz homicide, since everyone else knew it (see footnote 6, p. 9, *ante*).

C. No Independent Objective Evidence, Other Than Norberto's Suspect Testimony, Corroborates The Videotape's Linkage Of Petitioner To The Crime.

Respondent argues that the codefendant's videotaped assertions connecting petitioner to the crime were corroborated by independent objective evidence (Resp. Br. p. 20). Specifically, respondent points to petitioner's blood stained bandage seen by Norberto on the day of the crime (Resp. Br. pp. 23, 26, 27 n., 43 n.2) and petitioner's "adoption" by silence of Benjamin's statements to Norberto after the crime (Resp. Br. pp. 23, 31-32).[10] This evidence is independent and objective only if one assumes as a given, as respondent does, that Norberto's testimony about petitioner's visit to him after the crime was truthful. Petitioner's contention has always been, however, that he never made that visit (*e.g.*, J.A. 51, 56; Pet. Br. pp. 27-29). The bloody bandage and the supposed adoption by silence are no more objective than Norberto's suspect claim that petitioner confessed at all.

Respondent also argues that petitioner's confession itself independently corroborates Benjamin's videotaped

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[10] Norberto's testimony at the second trial that Eulogio [petitioner] confessed was impeached by his testimony at the first trial that, during the alleged visit, Norberto "asked Chino [Eulogio] what had happened, Benjamin spoke" (J.A. 50). In their briefs, the State and the government make skillful use of additional excerpts from the first trial in an attempt to rehabilitate Norberto's credibility (Resp. Br. p. 45 n., *Amicus* Br. pp. 24-25 n.25). Had the prosecutor at the second trial been as skillful, he might also have attempted to rehabilitate Norberto in this manner. Since he was not (J.A. 51), the only evidence of the first trial that came before the second jury was the impeachment, not the attempted rehabilitation, and it is therefore only the impeached testimony which can be considered by this Court as part of the record below.

accusations against petitioner (Resp. Br. p. 24). Again, respondent assumes as a given that this supposed oral confession to Norberto was made. Moreover, in arguing the reliability of this "independent" evidence, respondent points to the "minute" detail in petitioner's alleged confession and how consistent that detail was with the "photographic, ballistic, and forensic" evidence (Resp. Br. pp. 25-27, 50). The one major detail contained in that alleged confession, however—the firing of only one shot (see Resp. Br. pp. 6, 31 n.)—is inconsistent with the physical evidence that the attendant received *two* bullet wounds. Thus, to the extent that petitioner's alleged confession contained any "detail," it was inaccurate. Furthermore, while the "photographic, ballistic, and forensic" evidence may have corroborated Benjamin's confession to his own involvement in the crime, not one iota of it corroborated that portion which implicated petitioner in it.

Contrary to respondent's claims, therefore, Norberto's dubious testimony was the only evidence which corroborated Benjamin's videotaped assertions that petitioner was present at the robbery/homicide.

D. Respondent's Assertion That There Would Have Been No Practical Value To An Opportunity By Petitioner To Cross-Examine Benjamin Is Belied By The Record.

Citing to the codefendant's testimony at the pretrial hearing, the State and the government argue that Benjamin's videotaped accusations against petitioner were so reliable that any opportunity for petitioner to cross-examine Benjamin would have been without practical value, "dubious," and "unhelpful" (Resp. Br. pp. 28, 35; *Amicus* Br. p. 17 n.18). The hearing testimony shows exactly the opposite to be true.

As previously noted (p. 11, *ante*), Benjamin testified at the hearing that his videotaped confession was false; that

he, Benjamin, had no part in the crime but learned of it from petitioner, who *was* one of the robbers; that petitioner had then threatened him; and that petitioner had killed Jerry Cruz. Had Benjamin testified at petitioner's trial, petitioner's counsel could have made great use of this prior testimony in impeaching Benjamin.

If Benjamin testified consistently with the videotaped confession, petitioner would have been allowed to impeach that testimony by using the hearing testimony as a prior inconsistent statement. *See People* v. *Wise*, 46 N.Y.2d 321, 326, 385 N.E.2d 1262, 1265 (1978). Alternatively, had he testified consistently with his hearing testimony, petitioner could have impeached him with the videotaped confession. And, had Benjamin given yet a third version of events, petitioner could have impeached him with both prior statements. This cross-examination strategy would have demonstrated to the jury that Benjamin was not above giving false testimony. The jury would then have been instructed that if it disbelieved any portion of Benjamin's testimony (for example, his false disclaimers), it was entitled to reject his entire testimony (including his accusations against petitioner). *See* New York Criminal Jury Instructions, § 7.06 (1983).

Such cross-examination would also have dispelled the aura of "fraternal loyalty" that, according to respondent, surrounded Benjamin's videotaped confession. The jury would have learned of Benjamin's willingness to implicate his brother to serve his own selfish purposes. And, while the jury had the opportunity to observe Benjamin's demeanor in the videotape, Benjamin would have made a far worse witness when subjected to cross-examination, as he was at the hearing. Respondent correctly describes Benjamin's hearing testimony under cross-examination as "fraught with inconsistencies" and "inherently

unbelievable" (Resp. Br. p. 28). Also, cross-examination of Benjamin would have added support to counsel's argument that petitioner was under suspicion for the death of Jerry Cruz, and that Norberto's testimony was biased for that reason. Finally, under New York law, the jury would have been instructed to scrutinize Benjamin's testimony with extra care.[11]

In short, cross-examination would have shown the jury that Benjamin's videotaped accusations were not the dispassionate and unbiased statements of a loving brother. Rather, petitioner could have revealed them as the biased accusations of a demonstrated liar. Clearly, this opportunity would have been of tremendous "practical value." *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

PHILIP L. WEINSTEIN*
ROBERT S. DEAN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
* *Counsel of Record*

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[11] Where the evidence establishes a witness as an accomplice to the defendant, New York law requires the jury to be instructed that the witness's testimony must be corroborated by independent evidence materially *connecting the defendant with the commission of the crime*. *See, e.g., People* v. *Duncan*, 46 N.Y.2d 74, 79, 385 N.E.2d 572, 575 (1978).

No. 85-5939

In the Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ, PETITIONER

v.

STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the judgment can be supported on the ground that the non-testifying co-defendant's confession was sufficiently reliable to satisfy the Confrontation Clause.

2. Whether a co-defendant's out-of-court confession can be admitted at a joint trial, with proper limiting instructions, when the co-defendant's confession interlocks with petitioner's own confession on the essential elements of the crime.

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INTEREST OF THE UNITED STATES

This case raises important issues under the Confrontation Clause of the Sixth Amendment. The case involves out-of-court statements made by a non-testifying co-defendant to a civilian and later to the police. Those statements were admitted solely against the co-defendant. Petitioner himself confessed to the same civilian, and petitioner's confession was factually consistent with the co-defendant's statements. Respondent argues that the admission of the co-defendant's statements was proper on two grounds. First, respondent argues that the co-defendant's statements were sufficiently reliable that they could have been admitted even as substantive evidence against petitioner without violating the Confrontation Clause. Second, respondent argues that the fact that the co-defendant's confessions interlocked with petitioner's own confession prevented the co-defendant's statements from having a devastating effect on petitioner's case, see *Bruton* v. *United States*, 391 U.S. 123 (1968). It was

constitutionally permissible, respondent contends, for the trial court to admit the co-defendant's confession in the joint trial, subject to limiting instructions from the court.

The proper application of the Confrontation Clause in joint trials is a question that arises every day in federal criminal cases. The approach taken by the Court in resolving the issues in this case will significantly affect federal criminal prosecutions.

STATEMENT

1. In the early morning hours of November 29, 1981, gas station attendant Victoriano Agostini was murdered at his place of employment in the Bronx. An autopsy revealed that Agostini died from two gunshot wounds to the head. For several months the police had no leads in the case. In the spring of 1982, during an investigation of an unrelated murder of one Jerry Cruz (no relation to petitioner), the police interviewed Norberto Cruz, Jerry's brother. Norberto told the police that on the day of the Agostini murder, petitioner and his brother, co-defendant Benjamin Cruz, came to Norberto's apartment and told him that they had killed a gas station attendant in the Bronx. Pet. App. A4-A5; J.A. 32, 52-53; Tr. 28-29, 35-36, 38-39, 51.[1]

On May 3, 1982, the police interviewed Benjamin Cruz about the Jerry Cruz murder. While he was being questioned about that murder, Benjamin spontaneously admitted to the police that he and petitioner had killed a gas station attendant in the Bronx. Later that same evening, Benjamin gave a detailed, videotaped statement admitting his participation in the gas station murder. Pet. App. A5; J.A. 23, 68-69; Tr. 190-194. Based on Norberto's statements and Benjamin's admissions, indictments were returned against both Benjamin and petitioner for felony murder and related charges (J.A. 1, 3-13).

[1] "Tr." refers to the transcript of the second trial in this case (the first trial ended in a mistrial as a result of juror misconduct). The transcript of the first trial is referred to as "1st Tr." The transcript of the pretrial suppression hearing is referred to as "5/25/83 Tr."

2. At trial, Norberto testified in detail about his conversation with petitioner and Benjamin on November 29, 1981 (J.A. 31-51). At about 10:00 a.m. on that day, only hours after the police had discovered the murder victim, petitioner and Benjamin, both long-time acquaintances of Norberto's, stopped by Norberto's apartment.[2] Petitioner was very nervous and had a blood-stained bandage around his right arm. Pet. App. A4; J.A. 32-33; Tr. 28-29, 35-36, 38-39, 51. Norberto asked petitioner what had happened; petitioner explained that he and Benjamin "had gone to give a hold up to a gas station." Petitioner said he started struggling with the gas station attendant. The attendant then "bent down" and "took out a gun and fired." At that point, petitioner said, Benjamin "jumped up and fired at the man in the gas station." J.A. 33.

Benjamin then added to petitioner's description of the incident. He told Norberto that petitioner had sent him to search the gas station attendant but that he "hadn't done it well" (J.A. 34). Benjamin said that he saw the gas station attendant bend over, take out a gun, and fire at petitioner, at which point Benjamin shot the attendant (J.A. 34).[3] During his conversation with Benjamin and petitioner, Norberto offered to take petitioner to the hospital; petitioner declined, stating that he did not want to go to the hospital because it was "very dangerous" (J.A. 35). After about an hour, petitioner

[2] Norberto had known Benjamin for 15 years and petitioner for 25 years (J.A. 31-32). Norberto remembered the date of the visit because his wife had been discharged from the hospital that day (Pet. App. A5; J.A. 44).

[3] Benjamin did not say how petitioner got hurt or why he and petitioner had gone to the gas station in the first place (J.A. 34). Those facts had previously been discussed by petitioner, however, in Benjamin's presence (J.A. 33).

and Benjamin left the apartment along with Jerry Cruz, who resided with Norberto and who had been asleep during Norberto's conversation with petitioner and Benjamin (J.A. 35).[4] The next day, Benjamin returned to Norberto's apartment. Benjamin advised Norberto to clean the blood out of his car, which Norberto had lent to Jerry Cruz, because it was "very dangerous for Jerry" (J.A. 36).

Norberto did not inform the police of petitioner's and Benjamin's statements until April 1982.[5] He did so during an interview with Detective George Wood concerning Jerry's murder. J.A. 46-47; Tr. 208. On May 3, 1982, Benjamin came to the police station after Wood had left his card at Benjamin's home with a message that he wanted to discuss Jerry's murder (Tr. 209-210). Using an interpreter, Wood asked Benjamin if he knew anything about the murder of Jerry Cruz. Benjamin said that he did not, but he stated spontaneously that he had shot someone who shot his brother at a gas station in the Bronx. J.A. 29-30; Tr. 95, 191.[6] Benjamin was then advised of his *Miranda* rights (Tr. 82).

Later that evening, an Assistant District Attorney took a videotaped statement from Benjamin (J.A. 61-69; Tr.

[4] As the police later learned from Benjamin, Jerry Cruz was also a participant in the gas station holdup (Pet. App. A4; J.A. 65).

[5] When Norberto was asked at trial why he had not told the police about the statements earlier, he responded, through the court interpreter, that it was "[b]ecause [his] brother had the event" (J.A. 45). What Norberto apparently was trying to say was that he did not want to say anything because his brother, Jerry Cruz, was one of the perpetrators. Jerry was murdered in March 1982 (Tr. 207).

[6] The evidence at the suppression hearing revealed that Benjamin referred to the gas station murder to convince the police that he was telling the truth when he denied having anything to do with Jerry's murder. Benjamin told Detective Wood that "[i]f it was me, I would tell you." He then stated: "I have big balls. I killed the guy at a gas station at 149th Street and Southern Boulevard, who shot my brother clean into the arm. I shot him in the head with a 357 Magnum." 5/25/83 Tr. 7.

214-215). In his videotaped statement, Benjamin indicated that he had shot and killed a gas station attendant in November 1981 with a .357 magnum after the attendant had shot petitioner (J.A. 62). Benjamin correctly identified the location of the station and stated that after arriving there, he had pulled out a gun. Benjamin said that he and petitioner had told the attendant that "this was a holdup." J.A. 63, 67. Benjamin and petitioner then asked for money, but the attendant said it was not his to give away. Petitioner threatened the attendant, demanded money, and hit him on the bridge of the nose, whereupon petitioner and the attendant began fighting. The attendant fired a shot at petitioner and hit him in the left arm. Benjamin told petitioner to "look out" and then, from close range, shot the attendant between the eyes and killed him. J.A. 63-64, 67. Benjamin and petitioner took the attendant's money—a total of $62—and fled (J.A. 65).[7]

In addition to the statements by Benjamin and petitioner,[8] the government introduced medical and ballistics evidence. The Associate Medical Examiner testified that the victim died of two gunshot wounds. One shot hit the victim above the right ear. The other shot—which caused most of the damage—entered the victim's skull through the left side and traveled, in a downward path, to the right side. In addition, the victim had blunt force in-

[7] According to Benjamin, petitioner also fired a shot—"he shot him like to burn the clothes very close" (J.A. 68). Benjamin said that four individuals were involved in the robbery. The driver, Jerry Cruz, remained in the car (J.A. 65). Benjamin did not describe the specific role of the fourth participant, whom he called "Pacho" (J.A. 66). Benjamin also stated that after the incident, he and the other participants bandaged petitioner's arm (J.A. 67-68). Throughout his statement Benjamin referred to petitioner as "Chino" (see J.A. 65).

[8] When the statements were introduced at trial, and again during final jury instructions, the trial court instructed the jury that each defendant's statements were to be considered only against that defendant (J.A. 30-31, 33-34, 36, 59).

juries (due to a blow or a fall), including a laceration at the bridge of his nose, bruises around both eyes, and abrasions on his right cheek and left shoulder. J.A. 52-53; Tr. 229-231. A ballistics expert testified that the bullet recovered from the victim was a .38 caliber bullet, which could have been fired from a .38 caliber or a .357 magnum revolver. J.A. 54; Tr. 234-237.[9]

The jury found both Benjamin and petitioner guilty of felony murder, the only charge submitted for its consideration (Tr. 387). Petitioner was sentenced to a prison term of 15 years to life (J.A. 2).

3. On appeal, petitioner contended that the admission of Benjamin's statement violated petitioner's rights under the Confrontation Clause. He maintained that Benjamin's statement did not "interlock" with his own statement because Benjamin's statement was substantially more reliable. The Appellate Division of the New York Supreme Court affirmed the conviction without opinion (J.A. 71); petitioner was later granted leave to appeal to the New York Court of Appeals (J.A. 72).

The New York Court of Appeals affirmed petitioner's conviction by a divided vote (Pet. App. A1). The court of appeals reasoned that there was no Confrontation Clause violation because the statements by Benjamin and petitioner were interlocking. The court noted that although there were differences between the confessions, they were in agreement on "the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed" (Pet. App. A12). While acknowledging that Benjamin's confession was substantially longer than petitioner's, the court pointed out that "the details included did not contradict or modify the essential elements of [petitioner's] statement" (*ibid.*). The court rejected petitioner's contention that the confessions should not

[9] Petitioner did not put on any evidence (Tr. 292). Benjamin put on testimony by his mother that he was mentally slow for his age (Tr. 282-284).

be deemed interlocking because they differed in the degree of their reliability (Pet. App. A14).

The dissenting judges concluded that Benjamin's confession added substantial weight to the otherwise weak confession evidence introduced against petitioner, and that the two confessions were therefore not interlocking. In the dissenters' view, the jury must have considered Benjamin's confession in determining whether petitioner had in fact confessed to Norberto. Therefore, they concluded, the admission of Benjamin's statements in the joint trial violated the principles of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. A19-A21.

SUMMARY OF ARGUMENT

A. This Court has made it clear that out-of-court statements can be admitted against a defendant without violating the Confrontation Clause, even if the defendant has no opportunity to cross-examine the declarant, as long as the statements contain adequate "indicia of reliability." See *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 12-13; *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Although an accomplice's custodial confession is considered "presumptively unreliable," the presumption may be rebutted in a particular case if the circumstances show that the confession is highly likely to be reliable. *Lee*, slip op. 11-13.

Benjamin's out-of-court statements in this case contained numerous indicia of reliability. Specifically, the statements were against Benjamin's penal interest; they were corroborated by the physical evidence at trial and by petitioner's own interlocking confession; there is nothing to suggest that Benjamin's statements were based on faulty memory or that Benjamin had any reason to make a false accusation against petitioner: petitioner was able to confront Norberto and the police on whether Benjamin in fact made the statements and under what circumstances; and the jury was able to observe Benjamin's demeanor during the course of his videotaped confession.

Moreover, even if the Confrontation Clause requires that an accomplice be shown to be unavailable before his confession can be admitted against a defendant, Benjamin was unavailable to the government at the trial in this case, since he was a co-defendant who could not be called as a witness. Under these circumstances, the Confrontation Clause would not have prohibited the State from using Benjamin's statements as substantive evidence against petitioner. It follows, *a fortiori*, that the admission of those statements solely against Benjamin could not have violated petitioner's confrontation rights.

B. The admission of Benjamin's statements was valid for yet another reason: because petitioner gave a confession that "interlocked" with Benjamin's confessions, Benjamin's statements did not have a "devastating" effect on petitioner's case, and severance was therefore not required. This principle—that the holding in *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), does not apply to cases involving interlocking confessions—was adopted by the plurality in *Parker* v. *Randolph*, 442 U.S. 62 (1979). The rationale of the *Parker* plurality is eminently sound: a co-defendant's confession can hardly have devastating consequences for the defendant when the defendant himself has confessed. In that situation, there is no reason not to follow the general rule that juries can understand and apply instructions, including limiting instructions directing the jurors not to consider the co-defendant's statements against the defendant.

In the present case, the confessions interlocked on all the essential elements of felony murder. Both petitioner and his co-defendant admitted that they went to rob a gas station, that the attendant reached for a gun and shot petitioner in the arm, and that the co-defendant then shot and killed the attendant. Although petitioner claims that Norberto Cruz, the witness who testified about petitioner's confession, fabricated the whole conversation, Norberto's testimony was fully corroborated by the physical evidence and by various details in the co-defendant's later confession. Under those circumstances, petitioner's

claim that the confessions were not truly interlocking is without merit.

ARGUMENT

THE ADMISSION OF THE CO-DEFENDANT'S CONFESSION AT THE JOINT TRIAL DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE

A. Because The Co-Defendant's Statements Contained Strong Indicia Of Reliability, Petitioners' Confrontation Rights Were Not Violated

1. The usual method for ensuring the reliability of a statement is through cross-examination. *California* v. *Green*, 399 U.S. 149, 158 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 406-407 (1965); *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895). This Court has made it clear, however, that cross-examination of the declarant is not a prerequisite to the admission of every out-of-court statement offered against a defendant at trial. Instead, a variety of out-of-court statements are considered to carry sufficient "indicia of reliability" to be admissible, even in the absence of cross-examination. See *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 12-13; *Ohio* v. *Roberts*, 448 U.S. 56, 64-65 (1980); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972); *Dutton* v. *Evans*, 400 U.S. 74 (1970). When a particular statement falls within "a firmly rooted hearsay exception," the reliability of the statement can be inferred, without more. *Ohio* v. *Roberts*, 448 U.S. at 66. Even when a statement does not fall within a traditional hearsay exception, the Court has held that it "may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'" *Lee* v. *Illinois*, slip op. 13, quoting *Ohio* v. *Roberts*, 448 U.S. at 66; *Dutton* v. *Evans*, 400 U.S. at 88-89.

Analysis of the "indicia of reliability" accompanying Benjamin Cruz's confessions leads to the conclusion that

Benjamin's statements were sufficiently trustworthy to be admitted at trial without offending the Confrontation Clause. For that reason, there would have been no constitutional objection if Benjamin's statements had been admitted as substantive evidence against petitioner. It follows, *a fortiori*, that the admission of the statements solely against Benjamin, with limiting instructions directing the jury not to consider them against petitioner, could not have violated petitioner's confrontation rights. See *Nelson* v. *O'Neil*, 402 U.S. 622, 628-630 (1971).

In *Dutton* v. *Evans*, *supra*, this Court upheld, over a Confrontation Clause objection, the admission of an out-of-court statement that did not fall within a well-settled hearsay exception. *Dutton* involved the admission, at Evans's murder trial, of a statement made by one of Evans's accomplices to a cellmate named Shaw. The accomplice, Williams, had told Shaw that " '[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now' " (400 U.S. at 77). Williams's statement was introduced at trial against Evans through the testimony of Shaw. In an opinion by Justice Stewart, four members of the Court concluded that the admission of Shaw's testimony against Evans did not violate Evans's confrontation rights.[10]

The plurality concluded that Williams's statement was sufficiently reliable to be admitted against Evans, even though Williams had not been subject to cross-examination. Among the reasons that the Court listed in support of its finding of reliability were the following: (1) Williams's personal knowledge of the role played by others in the murder was sufficiently well established that it was "inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not

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[10] Justice Harlan concurred in the result. Viewing the case as involving due process, not the Confrontation Clause, he concluded that there was no due process violation. See 400 U.S. at 93-100.

Evans was involved in the murder" (400 U.S. at 88); (2) it was highly unlikely that Williams's statement was based on faulty recollection; and (3) the circumstances under which Williams made his statement, which was spontaneous and against his penal interest, made it unlikely that he had fabricated the statement to inculpate Evans. 400 U.S. 88-89.

Recently, in *Lee* v. *Illinois*, *supra*, the Court employed a similar approach to determine the reliability of another out-of-court statement by an accomplice. The issue in *Lee* was whether the trial court, at a bench trial, had properly considered the co-defendant's confession as substantive evidence against Lee. Since the case turned on its precise facts, those facts bear close examination.

During questioning about the stabbing deaths of her aunt and her aunt's friend, Lee confessed to the police that she and her boyfriend, co-defendant Edwin Thomas, had committed the stabbings. Thomas subsequently arrived at the police station for questioning. At first, he did not want to answer questions but instead wanted to think about whether he should talk to the police. Thomas and Lee asked to see each other, and they were given permission to do so. One of the police officers then asked Lee, in Thomas's presence, " 'what was the statement you had just given us implicating [Thomas].' " Lee then told Thomas that the police already knew everything and reminded him that they had agreed not to let one of them take the whole "rap." At that point, Thomas confessed as well. *Lee*, slip op. 2.

The majority pointed out that Lee's and Thomas's confessions differed in a number of important respects. For example, Thomas told the police that he and Lee had previously discussed killing Lee's aunt, thus admitting premeditation. Lee, by contrast, made no mention of any plan and indicated that at the time of the murder Thomas had simply been provoked by the behavior of the aunt. In addition, Lee placed the blame on Thomas for the murder of her aunt's friend; by contrast, Thomas

stated that, pursuant to their plan, Lee had beckoned the friend into the kitchen so that Thomas could murder her. *Lee*, slip op. 4-6, 15-16.

In ruling that the trial court had improperly considered Thomas's confession as substantive evidence against Lee, the Court stated that "Thomas' statement, as the confession of an accomplice, was presumptively unreliable and * * * did not bear sufficient independent 'indicia of reliability' to overcome that presumption" (*Lee*, slip op. 9). The Court made clear (*id.* at 12-13) that "the presumption [of unreliability] may be rebutted" but stated that the prosecution had simply failed to do so in that case. Although the Court acknowledged that the existence of an interlocking confession by the defendant provides significant support for the reliability of the co-defendant's statement, the Court found that Thomas's statement differed on too many key points to be considered "interlocking" with Lee's (*id.* at 14-16).

Four justices dissented in *Lee*. The dissenters would have found Thomas's statement to be sufficiently reliable to eliminate any Confrontation Clause problem. Thus, while the Court in *Lee* was split on the issue of whether Thomas's out-of-court statement was shown to be sufficiently reliable on the facts of that case, there was no disagreement that, in a proper case, a non-testifying co-defendant's out-of-court statement may be admitted as substantive evidence against the defendant.[11]

In the present case, there was no Confrontation Clause violation. Benjamin's statements present none of the

[11] Following the decision in *Lee*, this Court vacated and remanded for further proceedings a decison by the Supreme Court of New Mexico holding that the admission of a non-testifying co-defendant's statement violated the defendant's rights under the Confrontation Clause. *New Mexico* v. *Earnest*, No. 85-162 (June 27, 1986). In a concurring opinion, Justice Rehnquist wrote for four members of the Court (slip op. 2) that "the State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns."

problems that troubled the majority in *Lee*. Instead, they bear numerous distinct indicia of reliability. When these factors are viewed collectively, they lead to only one conclusion—that Benjamin's statements were sufficiently reliable to justify admission against petitioner even in the absence of cross-examination.

To begin with, Benjamin's statements fall "within a firmly rooted hearsay exception"—declarations against penal interest. The reliability of the statements can therefore "be inferred without more" (*Ohio v. Roberts*, 448 U.S. at 66).[12] Benjamin's statements were clearly against his penal interest, since he admitted committing a murder during the course of a robbery (J.A. 30, 34, 61-69) and thereby subjected himself to criminal prosecution for felony murder and related offenses. He did not attempt to "shift the blame" to petitioner but took primary responsibility for the incident.[13] Moreover, there

[12] A hearsay exception for declarations against penal interest is recognized in most jurisdictions, including the federal system (see Fed. R. Evid. 804(b)(3)) and New York (see, *e.g.*, *People* v. *Johnson*, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985)). That exception "rests upon 'the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect'" (*Lee*, slip op. 5 (Blackmun, J., dissenting), quoting 5 J. Wigmore, *Evidence* § 1457, at 329 (J. Chadbourn rev. 1974) (footnote omitted)). See also *United States* v. *Harris*, 403 U.S. 573, 583 (1971) ("Admissions of crime * * * carry their own indicia of credibility."); *Donnelly* v. *United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("[N]o other statement is so much against interest as a confession of murder."). The exception for declarations against penal interest covers not only statements implicating the maker but also statements implicating, and sought to be admitted against, the defendants. See, *e.g.*, *United States* v. *Riley*, 657 F.2d 1377, 1382 (8th Cir. 1981), cert. denied, 459 U.S. 1111 (1983); *United States* v. *Palumbo*, 639 F.2d 123, 129-130 (3d Cir.) (Adams, J., concurring), cert. denied, 454 U.S. 819 (1981); *United States* v. *Sarmiento-Perez*, 633 F.2d 1092, 1098 (5th Cir. 1981), cert. denied, 459 U.S. 834 (1982).

[13] Petitioner is simply wrong in asserting (Pet. Br. 20) that "Benjamin heaped substantial blame on petitioner" and "mini-

is nothing to suggest that Benjamin's statements were made as part of an effort to curry favor with the police.[14] Indeed, on the very date of the murder—long before any conversation with the police—Benjamin fully admitted his culpability to Norberto, in the presence of petitioner. In addition, Benjamin spontaneously admitted his role in the gas station murder while he was being questioned by the police about an unrelated matter and at a time when he clearly was not in custody and had not been accused of any crime (Tr. 110). See *Dutton*, 400 U.S. at 89 (noting that statement was spontaneous and against penal interest). He did so, almost in a bragging manner, to show the police that he was telling the truth in claiming that he had nothing to do with Jerry's murder. See page 4 note 6, *supra*. There is no evidence whatsoever to suggest that Benjamin admitted the murder as a result of prompting by the police or in the hope that he would win lenient treatment by making the admission. The subsequent videotaped statement, which was ruled to be voluntary (see Tr. 111-113),[15] was

miz[ed] his own culpability." Benjamin at all times took responsibility for actually killing the attendant.

[14] When a defendant is attempting to curry favor with the police, his statements may be unreliable, particularly when the defendant attempts to shift the blame to someone else. A number of courts have therefore been reluctant to find that custodial statements to the police that implicate third parties are declarations against penal interest. See, *e.g.*, *Fuson* v. *Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *Olson* v. *Green*, 668 F.2d 421, 426-428 (8th Cir.), cert. denied, 456 U.S. 1009 (1982); *United States* v. *Riley*, 657 F.2d at 1384-1385; *United States* v. *Palumbo*, 639 F.2d at 127-128. On the other hand, when there is nothing to suggest that defendant was motivated by a desire to ingratiate himself with the police or to shift the blame, the courts have upheld the admissibility of confessions as being against the declarant's penal interest. See, *e.g.*, *United States* v. *Robinson*, 635 F.2d 363, 364-365 (5th Cir.), cert. denied, 452 U.S. 916 (1981); *United States* v. *Garris*, 616 F.2d 626, 630-632 (2d Cir.), cert. denied, 447 U.S. 926 (1980).

[15] See *Lee*, slip op. 10 (Blackmun, J., dissenting) (noting that a finding of voluntariness supports the conclusion that the statement is reliable).

simply an elaboration of what Benjamin had previously told Norberto and the police. It in no way conflicted with his earlier statements. There is similarly nothing to show that Benjamin gave the videotaped statement to curry favor with the police or as a result of police coercion.

These facts distinguish Benjamin's statements in this case from Thomas's statement in *Lee*. Thomas's statement to the police was not accompanied by a prior statement to a civilian to corroborate its reliability, and Thomas's statement, unlike Benjamin's, was not freely volunteered. Thomas initially refused to talk to the police, and he did so only after being told that Lee had already implicated him. Moreover, the Court in *Lee* found that Thomas's statement might well have been influenced by a desire to shift blame to Lee. There is no basis for attributing any such motive to Benjamin in this case.[16] Because of the circumstances in which Thomas's statement was made, the Court in *Lee* did not accept the State's characterization of Thomas's confession as a "declaration against penal interest" (*Lee*, slip op. 13 n.5).[17] Benjamin's statement, however, suffered from none of the infirmities the Court found in Thomas's confession. Under the approach of both the majority and the dissenting opinions in *Lee*, Benjamin's videotaped statement and his prior unrecorded statements to Norberto and the police fell within the traditional category of declarations against penal interest.

Further support for the reliability of Benjamin's statements derives from the fact that they were fully corrob-

[16] The absence of any apparent motivation or effort on Benjamin's part to shift blame to petitioner distinguishes this case from *Douglas* v. *Alabama*, 380 U.S. 415 (1965). See *Lee*, slip op. 10-11; *id.* at 6-7 (Blackmun, J., dissenting).

[17] The four dissenting justices in *Lee* considered Thomas's statement to be a declaration against penal interest within the meaning of the firmly established hearsay exception for such statements (*Lee*, slip op. 4-5 (Blackmun, J., dissenting)).

orated by the physical evidence. For example, Benjamin stated that he shot the attendant with a .357 magnum (J.A. 62, 64); recovered from the victim was a .38 caliber bullet, which, according to the ballistics expert, could have been fired from a .357 magnum (J.A. 52-53; Tr. 234-235). Benjamin told Norberto that he "jumped up" and shot the attendant after the attendant "ben[t] over," picked up a gun, and fired it (J.A. 34); the medical evidence revealed that the bullets entered the victim's head in a downward trajectory (Pet. App. A6; J.A. 53). Benjamin described a physical altercation between petitioner and the attendant, which resulted in petitioner's striking the attendant on the nose (J.A. 63); the autopsy revealed blunt force injuries, including a laceration in the skin at the bridge of the attendant's nose (J.A. 52). Moreover, as the court of appeals noted, the government introduced photographs showing "substantial damage to the [gas station] office, inferentially establishing [petitioner's] struggle with the attendant before the murder" (Pet. App. A5-A6). As in *Dutton* (400 U.S. at 88-89), the corroboration of Benjamin's statement not only makes it highly likely that the statement was true, but also makes it virtually inconceivable that cross-examination could have shown that Benjamin was not in a position to know whether petitioner was involved in the murder. Petitioner himself acknowledged (Pet. 10 n.4) that "Benjamin's videotaped confession contained detail so realistic and minute that only someone who was present at the homicide scene could have uttered it."

Another indication of reliability is that Benjamin's confession was corroborated on all the essential elements by petitioner's own confession, and the confessions contained no significant discrepancies. Cf. *Lee*, slip op. 14, 16 (recognizing that an interlocking confession is a sign of reliability, but finding that discrepancies between the two confessions in that case went "to the very issues in dispute at trial" and that the confessions in that case were therefore not interlocking).

Furthermore, as in *Dutton*, it is highly unlikely that Benjamin's statement was based on an inaccurate memory or on a deliberate misstatement of the events (see 400 U.S. at 89). The vivid detail of the videotaped confession refutes any suggestion of a memory lapse, and there was nothing to show that Benjamin had any motive for falsely accusing his brother of being involved in the murder. Significantly, no evidence of any hostility between petitioner and Benjamin was introduced at trial.[18]

Finally, petitioner "was not deprived of any right of confrontation on the issue of whether [Benjamin] actually made the statement[s]" (*Dutton*, 400 U.S. at 88). Norberto and various officers who heard Benjamin's statements at the police station were witnesses at trial and subject to cross-examination. In addition, the jury viewed the 22-minute videotape of Benjamin's confession and thus had the opportunity to observe Benjamin's demeanor as he described both his and petitioner's roles in the gas station murder. Cf. *California* v. *Green*, 399 U.S. at 158 (noting that cross-examination enables jury "to observe the demeanor of the witness in making his statement, thus aiding [it] in assessing his credibility").

2. In addition to being reliable, Benjamin's statements were made by a declarant who was unavailable as a witness at trial. With regard to one class of hearsay—prior testimony—this Court has held that the Confrontation Clause requires the government to prove that the declarant is unavailable to testify at the trial before the hearsay

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[18] Even if Benjamin had testified at trial, the circumstances strongly suggest that his testimony would not have helped petitioner; it is more likely that he would have tried to shift more blame to petitioner and away from himself. Benjamin did just that at his pretrial suppression hearing, where he testified that he was not involved in the murder or robbery, but that he learned about it when petitioner and others arrived home and described what had happened (5/25/83 Tr. 81-83, 105). Benjamin further testified that his earlier statement, in which he had implicated himself, was false. He said he had made that statement to protect his family and because petitioner had threatened him (*id.* at 84, 97-98).

can be admitted. See *Ohio* v. *Roberts*, 448 U.S. at 65-66. The "unavailability" requirement has not been imposed with regard to other out-of-court statements, such as co-conspirator declarations. See *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986). In particular, the Court has not ruled on the question whether an accomplice must be shown to be unavailable before his out-of-court confession can be admitted as a declaration against penal interest, although the hearsay rules typically require such a showing (see Fed. R. Evid. 804(b)(3)).[19] Even if unavailability must be shown, we submit that unavailability was established in this case.

Because Benjamin was a co-defendant at trial, the State could not call him as a witness. Under the usual standards employed to assess unavailability, Benjamin was therefore unavailable to the government at trial. See *United States* v. *Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980); *United States* v. *Zurosky*, 614 F.2d 779, 792-793 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); *Phillips* v. *Wyrick*, 558 F.2d 489, 494 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978); Fed. R. Evid. 804(a)(1). As Justice Blackmun pointed out in his dissenting opinion in *Lee*, slip op. 3-4, the State should not be required to immunize one co-defendant in order to make him available for cross-examination by another. The costs to the State and the judicial system of requiring such a procedure would outweigh any possible benefit to the defense of making the declarant available. See *United States* v. *Inadi*, slip op. 8-12.

In sum, under the analysis employed both in *Dutton* and *Lee*, Benjamin's confessions constituted highly reliable statements by an unavailable declarant. Therefore, the Confrontation Clause would not have forbidden the

[19] The dissenters in *Lee* assumed that unavailability would have to be shown before an accomplice's statement could be admitted against a defendant. *Lee*, slip op. 2 n.2 (Blackmun, J., dissenting). The majority found it unnecessary to address the point. *Lee*, slip op. 9.

admission of Benjamin's statements, even if they had been offered as substantive evidence against petitioner. For that reason, petitioner certainly cannot complain about the introduction of the statements at the joint trial, where they were admitted solely against Benjamin.

B. The Co-Defendant's Statements Were Properly Admitted At The Joint Trial Because They Interlocked With Petitioner's Own Statement

In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that a co-defendant's confession that implicated the defendant could not be admitted at a joint trial, even solely against the co-defendant.[20] The Court based its decision on its conclusion that the co-defendant's confession had a "devastating" impact on the defendant's case and that the jury therefore could not be expected to follow the court's limiting instructions. In *Parker* v. *Randolph*, *supra*, the issue was whether *Bruton* applied even where the defendant himself had also confessed. In an opinion for four members of the Court, Justice Rehnquist concluded that the principle announced in *Bruton* does not apply in the case of "interlocking" confessions. The plurality concluded that where a defendant himself has confessed, "the incriminating statements of a co-defendant will seldom, if ever, be of the 'devastating' character referred to in *Bruton*" (442 U.S. at 73). For the same reason, "[s]uccessfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged" (*ibid.*). The plurality concluded that "when the defendant's own confession is properly before the jury, * * * [t]he possible prejudice resulting from the failure of the jury to follow

[20] The Court acknowledged that (391 U.S. at 128 n.3) "[t]here is not before us * * * any recognized exception to the hearsay rule * * * and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."

the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions" (*id.* at 74-75 (footnote omitted)).

Justice Blackmun concurred in the judgment. He refused to endorse the plurality's per se approach. He concluded, however, that the *Bruton* violation in that case was harmless beyond a reasonable doubt, and that it would likely be harmless in most other interlocking confession cases as well (442 U.S. at 77-81).

1. Petitioner argues (Pet. Br. 21-26) that the Court should reject the approach taken by the plurality in *Parker* v. *Randolph*, *supra*, and hold that the admission of a co-defendant's confession violates the principles of *Bruton*, even when the co-defendant's confession interlocks with the defendant's own confession. He maintains that even when the defendant has confessed, cross-examination would not necessarily be futile. The right of confrontation must be enforced, he asserts, even if "exercising [that] right would have 'yield[ed] small advantage.'" Pet. Br. 22.

We submit that the analysis in the plurality opinion in *Parker* was correct. When a defendant himself has confessed, the co-defendant's confession will almost never be "devastating" to the defendant's case. It does not disparage Confrontation Clause values to hold that a jury is likely to be able to follow a court's limiting instructions where the impact of a co-defendant's confession is blunted by the defendant's own admissions of guilt. In addition, the plurality's approach in *Parker* permits joint trials in cases in which the risk of prejudice to the defense is low. As the Court has noted, joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial" (*Bruton*, 391 U.S. at 134). Although the government can avoid severances simply by not using confessions in multidefendant cases, that approach exacts a very high price, since a

confession is "probably the most probative and damaging evidence that can be admitted against [a defendant]" (*Bruton*, 391 U.S. at 139 (White, J., dissenting)).[21]

The "harmless error" approach urged by petitioner is not a satisfactory alternative. The harmless error approach instructs trial courts that they are constitutionally required, even in interlocking confession cases, either to sever the cases or to exclude all statements by non-testifying co-defendants. As Justice Blackmun has observed, the failure to grant such relief in interlocking confession cases will usually be harmless (*Parker*, 442 U.S. at 79 (opinion of Blackmun, J.)). Yet in every interlocking confession case, including those in which any error would be virtually certain to be regarded as harmless on appeal, the "harmless error" approach would compel the trial judge to grant a severance or to prohibit the use of both defendants' confessions at trial. The better approach, we submit, is to permit joint trials in interlocking confession cases, subject to the discretion of trial courts to grant relief in particular instances if a serious risk of prejudice appears.

2. Petitioner further argues (Pet. 10-14; Pet. Br. 30-32) that even if a majority of this Court adopts the plurality approach in *Parker*, it should nonetheless reverse petitioner's conviction because the confessions in this case were not "interlocking." While he apparently concedes that the confessions were "factually interlocking" (Pet. 12),[22] petitioner asserts that they were not

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[21] Another solution is to redact the confessions to omit any references in each defendant's confession to the other defendant. However, it is not always possible to redact statements in that manner without gravely distorting their meaning. The Court now has before it the question whether redaction that simply omits all specific references to the other defendant is constitutionally sufficient. See *Richardson* v. *Marsh*, cert. granted, No. 85-1433 (June 9, 1986).

[22] Petitioner does contend (Pet. 11; Pet. Br. 27 n.12) that Benjamin's statements filled in "gaps" in the case against petitioner

sufficiently interlocking to satisfy the *Parker* test because of their "gross disparity in reliability" (Pet. 14). According to petitioner (Pet. 10 & n.4, 14), Benjamin's statements were highly reliable, whereas the reliability of Norberto's testimony about petitioner's confession was suspect. That argument is not persuasive.

In our view, the issue of whether statements are "interlocking" should be determined by the trial court, based on all the circumstances and subject to review only for abuse of discretion. Statements should be deemed interlocking if they are " 'substantially the same and consistent on the major elements of the crime involved.' " *Tamilio* v. *Fogg*, 713 F.2d 18, 20 (2d Cir. 1983), cert. denied, 464 U.S. 1041 (1984) (quoting *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45, 49 (2d Cir.), cert. denied, 423 U.S. 872 (1975)). The central focus of the inquiry should be whether the differences between the confessions are so fundamental that, despite the defendant's own confession, the admission of the co-defendant's confession will nonetheless have a "devastating" effect on the defendant (*Bruton*, 391 U.S. at 136).[23] Where the confessions interlock on the key facts, each defendant's confession will almost never have a devastating impact on the other defendant. While differences in the reliability of the statements may be relevant to the trial court's inquiry, those differences ordinarily should matter only when they are so fundamental that there is a serious doubt as to whether the defendant confessed at all. Absent such a grave divergence in reliability, the presence of a confession by each defendant will help ensure that the jury will be able to follow the court's instruction to consider the evidence against each defendant separately. For that reason, purported differences in reliability ordinarily should not prevent the application of the interlocking confession rule articulated by the *Parker* plurality.[24]

Under this approach, petitioner's confrontation rights were not violated by the admission of Benjamin's statements. Both the trial court and the court of appeals correctly ruled that the confessions were factually interlocking (Pet. App. A12; J.A. 23, 27-28). Each confession established all the elements of felony murder, and Benjamin and petitioner were in full agreement about their respective roles in the crime.

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because only Benjamin's statements revealed (1) that petitioner and Benjamin went to Norberto's house to pick up Jerry Cruz, (2) that Jerry was involved in the robbery, and (3) that it was because of Jerry's involvement in the robbery that Norberto failed to inform the police earlier about the confessions. These claims are erroneous. Norberto clearly testified that Jerry left with petitioner and Benjamin at the end of the visit on November 29, 1981 (J.A. 41). Moreover, in response to the question why he did not tell the police about the statements earlier, Norberto replied, through an interpreter, that it was because Jerry "had the event" (J.A. 45). That response suggests that Norberto did not go to the police because Jerry was a participant in the offense. That explanation is consistent with Norberto's informing the police about the statements only after Jerry's death.

[23] The approach we suggest addresses Justice Blackmun's concern in *Parker* (442 U.S. at 80) that if the plurality "is willing to abandon the factual inquiry that accompanies a harmless-error determination, it should be ready, at least, to substitute an inquiry into whether there is genuine interlocking * * *."

[24] In his dissenting opinion in *Parker*, Justice Stevens posed a hypothetical situation (442 U.S. at 84-85) in which a co-defendant confesses on television about how he and the defendant planned and carried out a murder, while the defendant's statement is "the testimony of a drinking partner, a former cellmate, or a divorced spouse of [defendant] who vaguely recalls [defendant] saying that he had been with [co-defendant] at the approximate time of the killing." Justice Stevens uses the disparity in the quality and contents of the statements in the hypothetical to demonstrate what he believes to be the problem with the plurality's approach in *Parker*. That hypothetical, however, is inapposite here. The defendant's statement in the hypothetical did not constitute a confession; it was merely a statement that the defendant had been with the co-defendant at the approximate time of the offense. The two statements therefore would not be interlocking at all. In this case, by contrast, the two defendants' statements interlocked on all the essential facts of the offense. In addition, unlike in the hypothetical, Norberto had a clear memory of petitioner's statements, not simply a vague recollection of petitioner's remarks.

Petitioner claims that Norberto's testimony was unreliable for the following reasons: (1) Norberto had a "prior record"; (2) he received welfare payments while working "on the street" as a mechanic; (3) he accepted money from his brother without inquiring about its source; (4) at the prior trial Norberto testified that Benjamin, not petitioner, had confessed to him; (5) Norberto waited several months before reporting the incriminating statements to the police; and (6) Norberto was seeking revenge because he thought petitioner had murdered his brother (Pet. 11; Pet. Br. 27-28).

These points do not withstand analysis. Norberto's criminal record consisted solely of an eight-year-old traffic conviction for driving without a license (J.A. 36-37); thus, except for one minor traffic offense, Norberto had a clean record. His receipt of welfare payments while he was performing occasional work on the street as a mechanic does not in any way suggest dishonesty or unreliability on Norberto's part (see 1st Tr. 194). Similarly, the money Norberto received from Jerry was simply Jerry's contribution to the upkeep of the household (J.A. 40-41). It is probative of nothing that Norberto did not interrogate Jerry as to where he got the money to pay his share of the expenses. Petitioner's claim that Norberto, at the first trial, maintained that Benjamin alone had confessed is incorrect; Norberto clearly testified that both petitioner *and* Benjamin had told him about the murder.[25] As to Norberto's reasons for not going to

[25] Petitioner bases his contention on the fact that at one point Norberto testified that when he asked petitioner what happened, Benjamin spoke (Pet. 11; see J.A. 50). Petitioner overlooks Norberto's testimony that petitioner, as well as Benjamin, had told him about the robbery (1st Tr. 151-152):

> Q: [By the prosecutor]: Did you ask [petitioner] how he got hurt?
>
> A: [By Norberto]: Yes. I asked him what had happened.
>
> Q: And what did he say how he got hurt?

the police sooner, Norberto's testimony (J.A. 45) suggests that, given Jerry's involvement in the incident, he did not want to report the statements and risk getting his brother in trouble. In any event, it is hardly surprising that a person would fail to come forward with evidence of a crime, but then report that evidence when approached by the police, as was the case with Norberto. Finally, petitioner was unsuccessful at trial in his effort to show that Norberto was attempting to implicate petitioner in a crime he did not commit in order to avenge Jerry's death. As the court of appeals noted (Pet. App. A13 n.2), there is nothing in the record to support that claim.

To the contrary, a number of factors underscore the reliability of Norberto's testimony. To begin with, his testimony (J.A. 33) that petitioner said the attendant "bent down" and that Benjamin then "jumped up and fired" is confirmed by the medical evidence that the bullets entered the victim traveling in a downward path (J.A. 53).[26] Norberto's recollection of petitioner's de-

> A: To [sic] the guy in the gas station had taken out a gun and had shot him.
>
> Q: And what happened—Did he tell you what happened to the guy who shot him?
>
> A: Yes. That they were wrestling, and when he bent over, he took out the revolver and fired and then, jumped, Benjamin jumped and fired.
>
> Q: Who fired? I'm sorry. Who fired at who?
>
> A: Benjamin.
>
> Q: Fired at who?
>
> A: The guy in the gas post.
>
> Q: And when [petitioner] told you that, where was Benjamin?
>
> A: He was present.

[26] Photographs of the murder scene that were admitted at trial (reproduced in the State's Brief in the New York Court of Appeals at 15-16) show that the gas station had a counter. Since the area behind the counter was covered with blood (as the photographs

scription of the events—that Benjamin was the one who killed the attendant, that petitioner was wounded by the attendant, and that the murder occurred during a hold-up—was fully consistent with Benjamin's statement to the police.[27] And Norberto gave unimpeached testimony about an easily verifiable fact—that he remembered the date of his conversation with petitioner and Benjamin because his wife had been released from the hospital that day (Pet. App. A5; J.A. 44). In addition, as the first trial court noted (J.A. 23), "Norberto was not a suspect in this or any other crime at that time and there is no claim that he was offering these revelations in return for lenient treatment from the police." In the end, Norberto's testimony was corroborated by the physical evidence and by Benjamin's statements, and Norberto was not impeached in any significant way.[28]

Petitioner has therefore failed to show why the principle articulated by the plurality in *Parker* should not apply in this case. The confessions interlocked on all of the key facts, as the courts below found (Pet. App. A11-A12; J.A. 23). And petitioner's assertion that Norberto's testimony was unreliable is factually unfounded. Ad-

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show), it is likely that the victim was shot while he was behind the counter. Because Benjamin was probably in front of the counter when he shot the attendant, it is understandable why Benjamin had to jump up when the attendant bent down.

[27] Petitioner finds it significant (Pet. Br. 5, 28-29 & n.14) that Norberto said that petitioner's right arm was injured while Benjamin said it was the left one. The important point, however, is that both Norberto and Benjamin testified that petitioner was wounded by the gas station attendant and had a bandage on one of his arms.

[28] Norberto withstood vigorous cross-examination by two defense attorneys at two trials in this case—the first trial having ended in a mistrial because of juror misconduct. Defense counsel also had potential impeachment material in the form of Norberto's grand jury testimony. A reading of Norberto's testimony at both trials reveals that defense counsel scored few points—and certainly no major ones—in their lengthy cross-examinations.

mission of Benjamin's statements at the joint trial, in the face of petitioner's own complete confession to felony murder, therefore did not have the "devastating" consequences to his case that are required for the principles of *Bruton* to apply.

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

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